COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TRADE

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

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COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

WEDNESDAY, MAY 2, 1990

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON TRADE,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 100 Longworth House Office Building, Hon. Sam M. Gibbons (chairman of the subcommittee), presiding.

[The press release announcing the hearings follows:]

FOR IMMEDIATE RELEASE
THURSDAY, APRIL 19, 1990

SUBCOMMITTEE ON TRADE #26
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

THE HONORABLE SAM M. GIBBONS (D., FLA.), CHAIRMAN, SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A HEARING, IN CONJUNCTION WITH THE SUBCOMMITTEE ON OVERSIGHT REPORT ON THE COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

The Honorable Sam M. Gibbons (D., Fla.), Chairman of the Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee on Trade, in conjunction with the Subcommittee on Oversight report, will conduct two days of public hearings on the commercial and trade operations of the U.S. Customs Service. The hearings will be held on Wednesday, May 2, and Thursday, May 3, 1990, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 9:30 a.m. both days.

The purpose of these hearings is two-fold: (1) to review the findings and recommendations resulting from the Subcommittee on Oversight's investigation of Customs' commercial operations (WMCP: 101-22); and (2) to review various legislative proposals to modernize and reform Customs' trade operations. The Subcommittee expects to receive testimony from Subcommittee on Oversight Chairman Pickle, Commissioner of Customs Carol Hallet, senior Department of the Treasury officials, as well as a number of private sector witnesses.

In announcing the hearings, Chairman Gibbons stated:

"I want to commend Chairman Pickle and members of the Subcommittee on Oversight for the thorough and effective investigation of the U.S. Customs Service commercial operations. Their report contains numerous findings and recommendations for reform which we will want to review during these hearings.

"These hearings will also give the Administration and members of the international trade community an opportunity to comment on the legislative and administrative recommendations.

"In light of the projections that merchandise entries and air passenger arrivals will double by the year 2000, it is imperative that the United States have the most modern and facilitative Customs Service in the world. Therefore, these hearings will also focus on various legislative approaches to reform and update Customs' commercial operations, including proposals to allow national entry and electronic processing."

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD:

Requests to be heard must be made by telephone to Harriett Lawler or Diane Kirkland [telephone (202) 225-1721] by close of business Thursday, April 26, 1990. The telephone request should be followed by a formal written request to Robert J. Leonard, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, room 1102 Longworth House Office Building, Washington, D.C. 20515. The Subcommittee staff will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning a scheduled appearance should be directed to the Subcommittee office [(202) 225-3943].

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are requested to briefly summarize their written statements. The full statement will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question hearing witnesses, witnesses scheduled to appear before the Subcommittee are required to submit 150 copies of their prepared statement to the Subcommittee on Trade office, room 1136 Longworth House Office Building, at least 24 hours in advance of their scheduled appearance. Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Any interested person or organization may file written comments for inclusion in the printed record of the hearing. Persons submitting written comments for the printed record should submit at least six (6) copies of their comments by the close of business Friday, May 11, 1990, to Robert J. Leonard, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, room 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing a written statement for the record of the printed hearing wish to have their statement distributed to the press and the interested public at the hearing, they may provide 75 additional copies for this purpose to the Subcommittee office, room 1136 Longworth House Office Building, prior to the start of the public hearing.

SEE FORMATTING REQUIREMENTS BELOW:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.

4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

* * * * * * * * * *

Chairman GIBBONS. Good morning, ladies and gentlemen. Today, the Subcommittee on Trade, in conjunction with the Subcommittee on Oversight report will begin two days of hearings on the commercial and trade operations of the U.S. Customs Service.

The purpose of these hearings is twofold: First, to review the implementation of the recommendations contained in the Oversight Subcommittee's investigative report and, second, to receive the views of the administration and the private sector on various legislative proposals to modernize and reform our Customs laws.

While it is not our intent to rehash the oversight investigation, there are many valid recommendations for improvement in the Customs Service that need to be addressed.

I am hopeful that these hearings will lay the foundation for a constructive process to improve the commercial operations of the Customs Service.

As the subcommittee charged with the responsibility of oversight of the Customs Service, I want to commend Chairman Pickle and his ranking member, Mr. Schulze, and the Subcommittee on Oversight for the really outstanding work that they have done over the last year and a half in producing a number of fine suggestions, excellent suggestions, recommendations, and recommendations to improve the direction of the Customs commercial operations.

I am also pleased with the directions that the Customs Service has taken in recent months under the leadership of Commissioner Hallett, to respond both constructively and with skill to the recommendations contained in this report, as well as the legitimate concerns of the business community. We indeed appear to be witnessing a new era in the direction of the Customs Service.

The implementation of the recommendations of the Oversight Subcommittee will go a long way to help the Customs Service in preparing for trade in the 21st century. A number of statutory changes are necessary as well. And we have not legislated in this area for over 13 years when we last enacted the Customs Procedural Reform Act of 1977.

I look forward to working with Commissioner Hallett and the Department and the Treasury, and the private sector over the next several months to put together a comprehensive program, both legislative and administrative, to change and modernize the Customs Service.

Our first witnesses this morning are our distinguished chairman and colleague, Jake Pickle and Richard Schulze. Let me say to both of you congratulations on doing your job well. You and your subcommittee have made a thorough and efficient investigation and the hard work of the investigative staff has produced this important report.

Before I go to Mr. McGrath and then to the witnesses, let me say we expect to break for lunch today around 12 o'clock. I cannot tell you exactly, but around that time, as the witnesses fit in or the rollcalls fall in.

And I want to commend the other members of the Oversight Committee for taking the time and the effort and the skill to put together this investigation.

Mr. McGrath.

Mr. McGrath. Thank you, Chairman Gibbons, and Chairman Pickle and my colleagues on the Oversight and Trade Subcommittees, I am very pleased to join you today in our continuing efforts to improve the operations of the United States Customs Service.

I join my colleagues today in welcoming Commissioner Carol Hallett. Those who live and work in my district in this area with Customs on a day-to-day basis around Kennedy Airport and the Port of New York have given high marks to Commissioner Hallett's early initiatives in commercial operations.

I also understand, from firsthand information, that employee morale has been bolstered over the last few months by her positive leadership.

In the remaining days of the 101st Congress, I hope we can work together to implement some of the recommendations of the Oversight Subcommittee report. Rapidly changing international trading relationships will increase the importance of Customs as we approach the 21st century. And I am confident that those assembled here today can help assure that the agency rises to its important missions.

Thank you, Mr. Chairman.

Chairman Gibbons. Thank you. Mr. Anthony.

Mr. Anthony. Thank you, Chairman Gibbons. I would like to also add my welcome to Commissioner Hallett, and tell the ranking member and the chairman of the Oversight Subcommittee I have enjoyed working with them in trying to come to grips with the commercial operations at Customs.

I do have a prepared statement and I ask that it be inserted in the record, Mr. Chairman.

Chairman Gibbons. Without objection, it will be inserted at this point.

[The statement of Mr. Anthony follows:]

Statement of Hon. Beryl Anthony, Jr., a Representative in Congress From the State of Arkansas

I thank the Chair for calling this joint hearing with Trade and Oversight Subcommittees to review the performance of commercial operations of the U.S. Customs Service and the recommendations contained in Chairman Pickle's Oversight report. I would like to welcome my distinguished colleagues, Chairman Pickle and the Oversight's Ranking Minority Member, Congressman Schulze, under whose leadership many of the abuses and mismanagement problems in Customs were uncovered.

For over 2 years, the Oversight Subcommittee has held hearings and conducted investigations into Customs commercial operations, and I participated in several of the onsite inspection of customs facilities. Chairman Pickle's report contains detailed findings of discrepancies, mismanagement problems and abuses in Customs operations which need to be addressed in order that Customs may more adequately fulfill its responsibilities of enforcing U.S. trade laws and expediting the movement of goods through its facilities, as well as its drug interdiction activities.

I look forward to this opportunity today, to address some of these concerns and to hear response from the Administration on the 16 findings and nearly 100 recommendations for corrective action contained in the Oversights report.

Chairman Gibbons. Mr. Pickle, would you like to proceed?

STATEMENT OF HON. J.J. PICKLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT, COMMITTEE ON WAYS AND MEANS

Chairman Pickle. Thank you, Mr. Chairman.

It is a pleasure to be here today and have this opportunity to testify on what I believe has been a very worthwhile and productive oversight effort on an issue of national and international importance.

I have here the Subcommittee on Oversight's report on abuses and mismanagement in U.S. Customs Service commercial operations issued on February 8, 1990. This report is the result of a comprehensive 2-year review of Customs operations conducted by the Oversight Subcommittee. This was done at the request of yourself on behalf of the Subcommittee on Trade, and by Mr. Rostenkowski on behalf of the full committee. The subcommittee's investigation was the first comprehensive review of Customs by the Congress in more than 10 years.

In conducting this review, the subcommittee members inspected Customs' facilities at five ports, both seaports and airports, throughout the country. The subcommittee staff inspected Customs facilities at an additional 15 or more ports, as well as at Customs headquarters here in Washington. During the subcommittee's investigation, members and staff met with hundreds of representatives of the local trade communities and with national trade organizations.

The subcommittee also held five public hearings on the issues involving Customs' commercial operations, including seizures of international cargo, the operation of centralized cargo examination stations, and the processing of protests, petitions, and drawback entries. During those hearings, the Oversight Subcommittee heard testimony from Customs officials, the Department of the Treasury, the Treasury Inspector General, the General Accounting Office, importers, customhouse brokers, Customs-law attorneys, Customs inspectors, the National Treasury Employees Union, International Passenger and Freight Carriers, port authorities, domestic industry, and many others.

I would like to emphasize at this point that it became abundantly clear to me, and I think to the members of the subcommittee and to Mr. Schulze, the ranking minority member, that during the course of this review, Customs has a very difficult mission to perform. We in the Congress are, to a large extent, responsible for Customs' predicament. At last count, Customs had some 400 statutes that they were responsible for enforcing. And while trade volume continues to grow at astronomical rates, appropriations for Customs commercial operations staff and other resources required for commercial operations have not kept pace.

I would also like to acknowledge all of the dedicated, sincere, and hardworking Customs employees. They are valuable to our processing. Without them, we would be in a much worse situation than we are today. Unfortunately, while Customs has benefited from good leadership over the years, during the decades of the eighties, Customs has suffered from what some might call overly aggressive, or even "gung ho," "macho" leadership. During that time, a great deal of the fundamentals were neglected.

The subcommittee report addresses several issues which are largely attributable to that neglect of fundamentals. The subcommittee makes 16 specific findings, and nearly 100 recommendations for corrective action. The bulk of the recommendations, which are

directed to Customs and Treasury, can be implemented administratively without legislation. For example, under finding No. 1, which deals with Customs' relationship with the international trade community, the report makes three recommendations to Customs and one to Treasury, all intended to improve relations between Customs and the trade community, and will not require legislation.

The three recommendations to customs are: One, maximize the flow of information to the trade community prior to implementing new policies or procedures, two, hold local meetings with trade representatives on a regular basis; and, three, establish, publicize, and follow, whenever possible, a gradual phased implementation schedule for all major policy or procedural changes. The related recommendation to Treasury is to ensure that anticipated changes in significant national policies and procedures are presented to the Treasury Advisory Committee on Customs Commercial Operations.

Other recommendations contained in the subcommittee's report will require legislation. A legislative recommendation intended to improve relations between Customs and the trade community, for example, is to establish a statutory Customs Commercial Operations Ombudsman's office.

Six of the subcommittee's legislative recommendations, including the establishment of a funding floor for Customs commercial operations, for example, are addressed in your Customs authorization bill, H.R. 4328, passed unanimously by the House on March 28, 1990. I would like to compliment the Trade Subcommittee and members for the speed with which they acted on these important issues. It is my understanding that the Subcommittee on Trade plans to address the remaining legislative recommendations today and at other hearings later this year.

It is also my understanding that Customs Commissioner Hallett and Assistant Secretary of Treasury, Mr. Nunez, have developed plans to implement the Subcommittee on Oversight's administrative recommendations, and are prepared to discuss those plans during these hearings. I look forward to hearing from both of them today.

Now, I would like to close, Mr. Chairman, by emphasizing that I heartily recommend that the changes recommended in this report be implemented. This report was adopted unanimously on a bipartisan basis by the Oversight Subcommittee. Mr. Schulze and the minority and the majority on our side worked together very harmoniously and attended most of these inspection trips, and have joined in their support. And I want to compliment the entire subcommittee on a bipartisan effort.

I thank you, Mr. Chairman.

Chairman GIBBONS. Thank you.

Now Mr. Schulze.

STATEMENT OF HON. DICK SCHULZE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND RANKING MEMBER, SUBCOMMITTEE ON OVERSIGHT, COMMITTEE ON WAYS AND MEANS

Mr. SCHULZE. Thank you, Mr. Chairman. I appreciate this opportunity also to discuss the results of the 2-year oversight investiga-

tion of abuses and mismanagement at the U.S. Customs Service, and on proposals to correct the problems we found. This was, as Chairman Pickle said, a bipartisan effort. And I want to thank him for his commitment to that throughout the investigation. Members on both sides deserve credit for their important contributions to the final report.

Mr. Chairman, our investigation of Customs is yet another version of the old "before and after" game.

Before we started our review, the glamour of drug enforcement caused Customs to stray from their essential mission to enforce trade laws and facilitate passengers and cargo. Commercial resources were diverted, while enforcement spending soared. Now, after our investigation, what is the case? Sadly, the last Customs budget continued that trend. But, with your, Mr. Chairman's help and Chairman Rostenkowski's leadership, the committee, for the first time, passed a funding floor for Customs' commercial operations for fiscal year 1991 and 1992. Customs is now "on notice" to stop this practice.

Before our investigation, Customs' accounting controls were in total disarray, and Customs violated the most basic of spending laws: that is, don't spend more money than Congress gives you. After we discovered these practices, what happened? Sadly, Customs still hasn't reported their spending violations, and new accounting problems continue to be discovered. In fact, just last month, GAO reported a total breakdown in the prenumbered receipt program. If what GAO found is even partly true, it is still an abomination. We have given Customs clear recommendations to get back on course. Now they are "on notice" to clean up this mess.

For years, I suspected that we weren't getting the return on seized assets sold at auction that we should. It turns out we lost our shirts while Customs was essentially paying a contractor millions of dollars to lose money disposing of these assets. After we reported this, Customs denied it at first. But now a new contractor is being selected, and the committee's recommendations are being seriously considered. Now Customs is "on notice" to turn this situation around.

Before our investigation, U.S. industries affected by unfair foreign trading practices, such as illegal dumping and subsidization, had no way of telling whether the proper antidumping or countervailing duties were being collected. Customs themselves had no idea what had been collected for a given case.

After we reported this, what has happened? Well, as Customs has committed to making the recommended changes, it appears that we may finally have gotten their attention. But, as with our other recommendations, Customs is "on notice" that the U.S. industry and this committee will be the final judges of whether Customs follows through on this commitment.

I say repeatedly that Customs is "on notice" for a very good reason. While promises of change have been made, they still have significant problems and a long way to go. In this instance, I believe that President Reagan's old axiom, "trust but verify" should be the watchword. It is like the story of the old man who, despite knowing of his illness, refused to take the medicine prescribed by

the doctor because it tasted bad. The word I am sending to Customs today is we intend to see that you swallow the bitter pill of reform.

We will do this through unannounced "spot" checks in various ports by both members and staff; through a 1-year intensive GAO general management review of Customs, and by audits of specific high-risk areas, like seized property, accounting and budget controls, and air passenger processing.

Now, what were some of the reasons that all this happened at Customs, and why did the subcommittee have to devote the kind of time and attention that it did?

I think there are two main reasons, Mr. Chairman. First, under the previous regime at Customs, the people at the top of the agency had a renegade, untouchable type attitude. This message had filtered down through the rank and file. In addition, some key managers had limited qualifications for the positions they filled. I am glad to see that some of these positions have changed and that they have been upgraded. However, we will continue to watch to see whether all the "housecleaning" that is needed actually is performed.

Second, and I think most troubling, was the abdication by the Treasury of its oversight responsibility. I find it hard to believe that the responsible people over there did not know that these problems existed. In fact, when a Customs financial official came forward and blew the whistle, she was essentially hung out to dry. I firmly believe that if Treasury had been doing its job properly, our investigation would not have been necessary.

I want to leave my colleagues with one final thought. This investigation shows the importance of a strong oversight presence with all the various agencies under our jurisdiction. If we do not perform this function, they will surely stray from the straight and narrow. Customs was a prime example of this. Perhaps for too long, we here in Congress didn't keep as watchful an eye as we should have. The people at Treasury certainly didn't. And we have got to make sure that this does not happen again.

I thank you, Mr. Chairman, for this opportunity to share my remarks.

Chairman GIBBONS. I want to thank both of you for your fine statements.

Mr. Pickle, I want to say again your committee did excellent oversight work, and your staff and everyone has worked cooperatively on all of this. And I feel confident that, with the implementation of your report and the followthrough on it, we will see a substantial improvement in the Customs' commercial operations.

Now, I just have one or two questions I would like to ask you.

Have you noticed any improvement in the Customs' commercial operations since you published your report in early February?

Mr. PICKLE. Yes, Mr. Chairman, I have seen some improvement. Commissioner Hallett seems very willing to meet with representatives of the trade community and with members of our subcommittee, and welcomes suggestions. I think she recognizes that certain system changes must be made in overall procedure that Customs will follow. And I think is willing to try to make these changes, and has implemented that. So I do see some changes.

I think though, Mr. Chairman, it is going to be a year before we will know how the turnaround is taking place down at Customs. It is my own personal opinion that the new Commissioner has got to either fire or remove or transfer part of the old palace guard down there so that we have a new start and she has her own team. But I like the attitude and I like the approach, and I do see some improvements.

Chairman GIBBONS. Well, let me ask you, do you intend your oversight efforts—to continue oversight efforts so that you can ensure that Customs implements your committee's recommendations?

Mr. PICKLE. Well, yes. As soon as Treasury and Customs has issued its implementation plan and you, this committee, has in effect approved and put it in place, I do think that a continuation of review of these various boards should be made.

Mr. Chairman, that is going to depend a great deal on what the chairman of the committee and what you and the Trade Committee recommends that we would do. But it is my very strong recommendation that either the Oversight or the Trade Subcommittee continue its oversight investigation and actually drop in on these ports unannounced, or to make regular systematic reviews because it is terribly needed.

The fact that we have not done it in 10 years allowed everybody to kind of keep hands off and go their own way. And that ought to stop, and I think the best way to do that is to have a continued strong investigating committee at work.

Mr. SCHULZE. Mr. Chairman, if I could join in that recommendation, I feel very strongly that either the Oversight or the Trade Subcommittee has to keep that pressure on at least for the next year or so.

Chairman GIBBONS. Yes. I agree that one of the things that Congress has not done well, and that is oversight, and we need to step up our efforts. And this looks like the year to do it. It is not a big legislative year as far as the rest of the subcommittees are concerned. And I think it gives us time to do the oversight that we haven't had a chance to do. And I think both of you set a good example about how the oversight could be done, and your staff has certainly set a good example.

And I will continue to work with you and cooperate with you in any way that I am able to.

Our questioning order this morning is Mr. McGrath, Mr. Anthony, Mr. Pease, Mr. Chandler, and Mr. Thomas.

Mr. McGrath.

Mr. MCGRATH. Thank you, Mr. Chairman. And I want to thank my colleagues for their testimony. I want to just say that it has been my pleasure to work with these two gentlemen and the other members of the Oversight Subcommittee in our hearings. I would also like to congratulate the staff for the fine work that they have done.

Chairman Pickle and Mr. Schulze, what do you think of the 16 findings of the Oversight Subcommittee? What do you think are and have been the most serious?

Mr. PICKLE. Well, I would say, just to single out one, would be the fact that we have slighted the enforcement areas in commercial operations. At least we haven't done enough in that area.

It is a difficult line to cross between regular commercial operations and the drug enforcement. And they go together, and inevitably you have to make a separation. But I don't think we have done enough in commercial operations. So that would be my first recommendation.

Mr. MCGRATH. I agree. I come from an area that is very intensive in Customs Service use, around Kennedy Airport and Port of New York.

Mr. SCHULZE. Let me not only agree with that, but also take a moment to thank the gentleman from New York for his excellent work on the subcommittee. He was a valuable member and made great contributions.

Mr. MCGRATH. Well, I thank the gentleman.

Mr. SCHULZE. His advice and counsel was very important.

Mr. MCGRATH. Well, I was doing that out of self-intimidation. There are an awful lot of people who live and work at Kennedy Airport. And self-preservation was in mind.

My general feeling is that the Customs Service, over the last number of years, had gotten away from the commercial side, and perhaps necessarily onto the enforcement side. But, at the same time, I think it led to some neglect on the commercial side. And I am happy that the work that our subcommittee has done has shifted the focus back, I think, to the commercial side. And I think if that happens, well, then it was well worth it.

I thank the gentleman, thank the chairman.

Chairman GIBBONS. Mr. Pease.

Mr. PEASE. Mr. Chairman, I don't have any questions of our two distinguished colleagues. But I too would like to congratulate them for an excellent piece of work.

It seems to me that too often Congress neglects its oversight role. We, I think, have a very important function in overseeing the operations of the Federal Government. Almost all committees have oversight subcommittees to do that job. But, in my experience, that job is often neglected.

I must say that under the leadership of Mr. Pickle and Mr. Schulze, that has not been the case with the Ways and Means Oversight Subcommittee. It has been one of our most active subcommittees, and the excellent work that the subcommittee has done in relation to Customs Service merely illustrates the depth and breadth of the good work that the subcommittee has been doing.

I have an interest in Customs, and the chairman has been very good about inviting me to participate in its hearings. I went down to Houston with the subcommittee and found that to be a very educational experience for myself.

So I would just like to thank and congratulate the subcommittee for a job very, very well done.

Chairman GIBBONS. Mr. Rangel.

Mr. RANGEL. Thank you for the courtesy, Mr. Chairman.

I would just like to join with those that are thanking my friend and distinguished chairman of the subcommittee, and my col-

league, Mr. Schulze, for the outstanding job that they have done in paying tribute to Customs for what they have done in interdiction, and also for their valiant attempt to keep the poison of narcotics from coming into the United States and, at the same time, keeping focus on their primary mission to expedite trade, and to make certain that our borders are not an impediment to legitimate trade.

We have to have a well-balanced view on this, and sometimes your position is misunderstood by others in thinking that they have paid too much attention to stopping drugs from coming to the United States. But knowing you as well as I do, and Mr. Schulze who has been on several missions involving the international trade trafficking, I just wanted to set the record straight and thank you for the support that you have given Customs for their overall performance in that area.

Mr. PICKLE. Mr. Rangel, I want to thank you and your subcommittee for your cooperation because we worked closely in this oversight approach. And your helping me, I very much appreciate.

Chairman GIBBONS. All right. Fine. Are there any other questions for this panel?

[No response.]

Chairman GIBBONS. Thank you, gentlemen, very much, and we would appreciate your joining us for the rest of the hearing.

Commissioner Hallett, we are glad to have you here. First, we recognize that you are a new person on the job, and I may say, as a new person, you have certainly attracted the attention of a lot of people with the very workmanlike way in which you have handled your responsibilities.

And so we will just hear from you right now.

STATEMENT OF HON. CAROL B. HALLETT, COMMISSIONER OF CUSTOMS, U.S. CUSTOMS SERVICE, ACCOMPANIED BY MICHAEL LANE, DEPUTY COMMISSIONER

Commissioner HALLETT. Chairman Gibbons, Chairman Pickle, members of both subcommittees, I am very pleased to come before you today, to discuss the recommendations enumerated in the Customs' commercial operations report, which was issued by the Oversight Subcommittee, and to discuss needed changes in the statute body under which Customs operates; and the latter in the form of a modernization proposal we are currently working on with the Department of Treasury, OMB, and the trade.

With me this morning is Deputy Commissioner Michael Lane, who has worked with you over the course of your inquiry.

Mr. Chairman, while I have a somewhat lengthy statement, which will respond to many of the questions and comments that have been raised in the Pickle report and by the chairman and the ranking minority member on the Trade Subcommittee.

At the outset, I want to say to both subcommittees that the Customs Service is firmly committed to enhancing its operational performance, be it through agency concept innovation, or corrective action to address the recommendations which are spelled out in Chairman Pickle's report.

In going over the findings and recommendations of the Pickle report in the last few weeks, I have found this document to be a

valuable guide in that it outlines some organizational deficiencies from an outside perspective—that, being the perspective of this committee.

And as the Customs Service moves forward in upgrading and enhancing its trade facilitation and enforcement activities, I intend to use some of your findings and recommendations as reference points for the purpose of charting and rectifying planned or ongoing corrections of Customs' shortcomings.

At this point, I would like to touch on a few of the recommendations which I know are important to the committee, and then move to the subject of changes which must be addressed legislatively. I will provide for the record a framework to address the recommendations that are not singled out in this particular report.

Some of the issues raised in your findings, along with some of the recommendations, identify specifics of significant importance. For example, your finding No. 1 speaks to a deteriorated relationship with the trade community. In some measure, I can appreciate the trade's position and its perspective, and our response acknowledges past problems. Having said that, I want you to know that my position is to recognize that the trade community has a bottom line to deal with, and we are going to do our very best to take into account all of this while, at the same time, enforcing the laws which are on the statute books.

As you know, we have regular contact with many major trade groups on an ad hoc basis and through quarterly meetings with our Commercial Operations Advisory Committee, which is under the auspices of Treasury. The latter forum was statutorily established by the Ways and Means and Finance Committees, and it is one in which the various trade community interests basically set the agendas. In addition, I have met and will continue to meet informally with various trade groups.

I will also reach out to the trade through a new publication which we are developing—the "Customs Trade Quarterly." This publication will focus on system, program and other relevant changes in commercial operations and inspection and control issues.

Your finding No. 2 closely follows finding 1 in that it speaks to the notion of a slippage in commercial services, in both the context of resource diversions and a failure to adjust staffing patterns to match trade community activity patterns.

In response to this finding, I have discussed with my staff a plan to undertake an analysis of a typical Customs workday so as to obtain data on our employees and how their time is allocated, particularly with respect to normal tasks. Among other things, I hope to get a better feel as to how best to allocate appropriated resources.

Second, I want you to know that Customs has taken explicit actions to adjust hours of operations and staffing to trade patterns. For example, personnel have been added to Orlando, Miami, and Raleigh/Durham Airports to accommodate new passenger traffic. During April, 13 inspectors were added on a 1-to-9-p.m. cargo shift at JFK airport. New inspector shifts have also been added at Dallas/Fort Worth Airport, and hours of cargo processing have been extended at Otay Mesa and Calexico on the Mexican border,

and at all cargo locations in the southwest region, service is now being provided for at least 12 hours per day.

Moving to another of the findings you consider to be of great importance, that which addresses so-called flaws with Customs automated commercial system, ACS. I want you to know that senior Customs management is working to develop planning approaches along the lines that you have addressed. In this sense, we will direct our ACS effort beyond mere automation and more towards a "user-focused" approach of improved service which is responsive to internal and external user needs.

These sharpened efforts will assure two things. One, that there is adequate technical testing before module implementation, and two, that adequate information is disseminated to the trade community on the schedule of planned implementation moves.

Within ACS is the cargo selectivity system which is oriented toward sorting out shipments which require Customs examinations. This is a major concern to the subcommittee, as it is to Customs. Accordingly, we will continue to refine our criteria, particularly through a more concrete definition of, and implementation plan for our Tier III selectivity.

Within the next month, we will convene a development group to refine this advanced selectivity concept and formulate a criteria management system that will help us better evaluate and remove noneffective criteria. We will also further explore methods to relieve importers of the burdens of repetitive exams, and we will study the issue of perfecting historical records so that they are more accurate and up to date.

Mr. Chairman, as you know, Customs resources have been stretched considerably in the last few years, making it sometimes difficult to balance the multidimensional mission we carry out. In seeking ways to mitigate problems associated with increasing cargo volumes, particularly as regards more efficient uses of resources, we created centralized examination stations. This concept has been widely praised in many quarters and has worked extremely well.

The concept of the CES was designed around the notion that Customs had room within which resources could be better controlled and utilized.

While there is no question that this program is invaluable, there is a cost from the trade's perspective. The cost is in monetary terms. Accordingly, we are redesigning our procedure for entering into an original agreement with a CES operator. We will advertise for and select CES locations with the fee structure as an explicit criterion for selection.

We intend to also rely on trade input, through local oversight panels, composed of Customs and trade representatives, who will identify overcharges and recommend cessation of agreements with problem operators.

We also are rewriting the CES implementation directive to identify more clearly the responsibilities of each party involved in the CES process. And we will conduct surveys on the process in each district for use in identifying and correcting weak program areas.

Before leaving the CES issue, I want to tell you that, in response to your finding No. 14, on the distribution of CES costs, Customs will conduct a national survey of exam costs at CES facilities.

Mr. Chairman, in the interest of time, I do not want to address each recommendation in the report. I have tried to touch on a few of the major areas of concern, namely the issues on relations with the trade community, resource allocations, better analysis methods on which to base resource decisions, selectivity criteria, ACS planning and the issues related to CES's. I realize that this does not cover the waterfront. But, as I mentioned earlier, I do intend to provide for the record a framework which will outline the path that we intend to take.

I would like to turn now, to the statute body under which Customs operates and discuss various changes which we feel are necessary to provide Customs with the legal framework to carry forth some of our modernization initiatives. This discussion goes to references which both the Trade Subcommittee and Oversight Subcommittee have made with respect to needed changes in law.

Mr. Chairman, over the last year, substantial work has gone into a series of modernization proposals which we at Customs refer to as the Modernization Act. We are currently working with the Treasury, OMB, and specifically the trade community to develop this set of proposals into a formal legislative package.

The thrust of our modernization proposals essentially recognizes a few truisms:

First, the merchandise processing workload volume of the Customs Service will probably double in the next 10 years, and we need to position the organization now in preparation for that.

Second, Customs' resources, as the subcommittee chairman mentioned, are not unlimited and, therefore, must be prudently managed.

Third, the importing community is entitled to the most efficient form of merchandise processing and must have efficient processing in an era when time management translates to money management.

In recognition of these truisms, and in taking account of increasing technology changes in the international trade environment, Customs must develop innovative systems and procedures to keep pace with the constituency it must serve.

In many ways, these proposals are follow-ons to the significant progress we have made in such areas as automation, electronic processing, and paperless entry. Logically then, we should capitalize on past successes. The problem now is that we have taken our progress about as far as we can under the existing statute framework.

Further enhancements and additions to our past accomplishments will benefit both Customs and the trade community. But the legal basis must be in place. The proposals we are working on with the Treasury can be grouped into several major subject areas: electronic processing, national entry processing, marking requirements, recordkeeping, administrative—such as liquidation periods and fines and penalties authorities.

In developing this package, Customs sought opinions and advice from various quarters of the trade community, and we will continue to follow this path of consultation. While we may not at this time agree on all of the areas in that modernization act, we want

input from the trade community so that we can work out differences.

Much of the substance of this set of modernization proposals is very technical so I won't attempt to go into it point by point. Further, it is not yet an administration sanctioned package. It is still at Treasury. But, nevertheless, we will hopefully, in the near future, provide you with that list of statutes. We intend to continue to work in that direction with this committee, with our superiors at Treasury, and with the trade community. Toward this end, I appreciate very much this committee's offer to assist us in modifying the statutory framework and to accommodate full electronic processing of Customs' commercial transactions.

Finally, Mr. Chairman, as a new commissioner, I want this committee and the trade community and their representatives here today to leave this hearing with the assurance that the Customs Service believes in the goals which you and the trade seek, because we all seek these goals. We will at times disagree on paths to get to those goals because of our different roles in the process. Nevertheless, I will tell you that Customs will work with you as best we can to continue to move this outstanding organization in the direction of enhanced mission performance.

That concludes my statement. I will be happy to try and respond to your questions.

[The statement of Commissioner Hallett follows:]

STATEMENT OF CAROL B. HALLETT, COMMISSIONER U.S. CUSTOMS SERVICE

Chairman Gibbons, Chairman Pickle and members of both Subcommittees, I am pleased to come before you today to discuss the recommendations enumerated in the Customs Commercial Operations Report issued by the Oversight Subcommittee, and to also discuss needed changes in the statute body under which Customs operates -- the latter in the form of a modernization proposal we are currently working on with the Department of Treasury, OMB and the trade. With me is Deputy Commissioner Michael Lane who has worked with you over the course of your inquiry.

At the outset, I want to say to both Subcommittees that the Customs Service is firmly committed to enhancing its operational performance, be it through agency concept innovation, or corrective action to address the recommendations which are spelled out in Chairman Pickle's report.

In going over the findings and recommendations of the Pickle report in the last few weeks, I have found this document to be a valuable guide to me in that it outlines some organizational deficiencies from an outside perspective -- that is, this Committee's perspective. While I do not agree completely with all of the findings, I do have a better feel for those aspects of Customs operations which are important to you as our legislative overseers, and that is important to me personally as the new Commissioner.

As the Customs Service moves forward in upgrading and enhancing its trade facilitation and enforcement activities, I intend to use some of your findings and recommendations as reference points for the purpose of charting and rectifying planned or ongoing corrections of Customs shortcomings.

As I have talked with my staff about the history of the Oversight Subcommittee's inquiry into Customs Commercial Operations, my sense is that the feeling up here has been that Customs does not care about, or is in wholesale disagreement with all of the report's findings and all of its recommendations. While there is disagreement with some of the findings, and with the recommended ways to address noted problems, the Customs Service is not opposed to working through its problems, nor are we so preoccupied with our many past improvements that we are not willing to address existing problems.

At this point, I would like to touch on a few of the recommendations which I know are important to the committee, and then move to the subject of changes which must be addressed legislatively. I will provide, for the record, a framework to address the recommendations I do not single out in this statement.

Some of the issues raised in your findings, along with some of the recommendations, identify specifics of significant importance. For example, your finding number one speaks to a "deteriorated" relationship with the trade community. In some measure, I can appreciate the trade's position and its perspective, and our response acknowledges past problems. Having said that, I want you to know that my position is to recognize that the trade community has a bottom line to deal with, and we are going to do our best to take account of this while at the same time, enforcing the laws which are on the statute books.

We have already stepped up, and will continue to improve, our efforts to seek the cooperation and comments of the trade community because it's the right thing to do and because they have valuable input.

As you know, we have regular contacts with many major trade groups on an ad hoc basis and through quarterly meetings with our Commercial Operations Advisory Committee which is under the auspices of Treasury. The latter forum, statutorily established by the Ways and Means and Finance Committees, is one in which the various trade community interests basically set the agendas. In addition, I have met, and will continue to meet informally with the various trade groups.

My interaction with these groups is important to me personally in this job. It is also important to me that these groups use these meetings to input their views on new and ongoing Customs commercial programs as we interface with them around the

country on a daily basis. Accordingly, I intend to work closely with them.

I will also reach out to the trade through a new publication which we will develop -- the "Customs Trade Quarterly". This publication will focus on system, program and other relevant changes in commercial operations and inspection and control issues.

Your finding number two closely follows finding one in that it speaks to the notion of a slippage in commercial services, in both the context of resource diversions and a failure to adjust staffing patterns to match trade community activity patterns. In response to this finding, I have discussed with my staff, a plan to undertake an analysis of a typical Customs workday so as to obtain data on our employees and how their time is allocated, particularly with respect to normal tasks. Among other things, I hope to get a better feel as to how best to allocate appropriated resources.

Secondly, I want you to know that Customs has taken explicit actions to adjust hours of operations and staffing to trade patterns. For example, personnel have been added to Orlando, Miami and Raleigh/Durham Airports to accommodate new passenger traffic -- inspectors have been added to Portland, Oregon to handle a new express courier hub -- during April, 13 inspectors were added to a 1 to 9 p.m. cargo shift at JFK Airport -- new inspector shifts have been added at Dallas-Ft. Worth Airport -- hours of cargo processing have been extended at Otay Mesa and Calexico on the Mexico border -- at all cargo locations in the Southwest region, service is now being provided for at least 12 hours per day.

These are just a few examples of substantial improvements we have made to try to better accommodate the trade community. Can we make further improvements? Yes. And we will insofar as resources allow.

Moving to another of the findings you consider to be of great importance, that which addresses so-called "flaws" with Customs Automated Commercial System (ACS), I want you to know that senior Customs management is working to develop planning approaches along the lines you have addressed. In this sense, we will direct ACS efforts beyond mere automation, and more toward a "user-focused" approach of improved service which is responsive to internal and external user needs.

These sharpened efforts will assure two things: One, that there is adequate technical testing before module implementation, and two, that adequate information is disseminated to the trade community on the schedule of planned implementation moves.

Within ACS is the Cargo Selectivity System which is oriented toward sorting out shipments which require Customs examinations. The Selectivity System is based on criteria which must be closely managed in the operational environment for purposes of accuracy. This is a major concern to the Subcommittee as it is to Customs. Accordingly, we will continue to refine our criteria, particularly through a more concrete definition of, and implementation plan for our Tier III Selectivity. Within the next month, we will convene a development group to refine this advanced selectivity concept and formulate a criteria management system that will help us better evaluate and remove non-effective criteria. We will also further explore methods to relieve importers of the burdens of repetitive exams, and we will study the issue of perfecting historical records such that they are more accurate and up to date.

Mr. Chairman, as you know, Customs resources have been stretched considerably in the last few years, making it sometimes difficult to balance the multi-dimensional mission we carry out. In seeking ways to mitigate problems associated with increasing cargo volumes, particularly as regards more efficient uses of resources, we created centralized examination stations. This concept has been widely praised in many quarters and has worked extremely well.

The concept of the CES was designed around the notion that Customs had room within which resources could be better controlled and utilized. For example, inspectors who remain in one location can spend more time examining cargo in one location

than they can spend examining cargo in three or four scattered locations, given the travel time involved in the latter case. Thus, from a resource utilization standpoint, it makes sense to ensure that inspectors are indeed spending time examining cargo rather than wasting half a day travelling. Also, cargo can clear faster in a centralized location than it can if it must "sit" in a location until an inspector gets to it. In short, CES's expedite cargo release which is good for the trade and good for Customs.

While there is no question that this program is invaluable, there is a cost from the trade's perspective -- the cost is in monetary terms. Accordingly, we are redesigning our procedure for entering into an original agreement with a CES operator. We will advertise for and select CES locations with the fee structure as an explicit criterion for selection. We intend to also rely on trade input, through local oversight panels, composed of Customs and trade representatives, who will identify overcharges and recommend cessation of agreements with problem operators. Agreements will now include a clause to allow either party, the Government or the operator, to exit an agreement with 90 days notice.

We also are rewriting the CES Implementation Directive to identify more clearly, the responsibilities of each party involved in the CES process, and we will conduct surveys on the process in each district for use in identifying and correcting weak program areas.

All in all, we feel that relying on the trade community to identify irregularities will be effective in controlling prices charged by CES operators. It will also be less intrusive than the bureaucratic system of control and audit of operators which would be necessary if Customs were to assume hands-on operation of CES's in the field.

Before leaving the CES issue, I want to tell you that in response to your finding number fourteen on the distribution of CES costs, Customs will conduct a national survey of exam costs at CES facilities. While the survey format is only now being developed, it will include location and average cost of exam.

Mr. Chairman, in the interest of time, I do not want to address each recommendation in your report. I have tried to touch on a few of your major areas of concern -- namely the issues on relations with the trade community, resource allocations, better analysis methods on which to base resource decisions, selectivity criteria, ACS planning and the issues related to CES's. I realize that this does not cover the waterfront, but as I mentioned earlier, I intend to provide, for the record, a framework which will outline the path we will take in addressing those concerns enumerated in your report which were not clearly addressed in our response.

I know that this hearing is not an event -- rather it is part of a process. Therefore, I will continue to consult with the Committee, as you see fit, and to have appropriate Customs staff interface with your staff throughout the process.

I would like to turn now to the statute body under which Customs operates and discuss various changes which we feel are necessary to provide Customs with the legal framework to carry forth some of our modernization initiatives. This discussion goes to references which both the Trade Subcommittee and Oversight Subcommittee have made on needed changes in law.

Mr. Chairman, over the last year, substantial work has gone into a series of modernization proposals which we at Customs refer to as the Modernization Act. We are currently working with the Treasury, OMB and the trade to develop this set of proposals into a formal legislative package.

The thrust of our modernization proposals essentially recognizes a few truisms:

-- The merchandise processing workload volume of the Customs Service will probably double in the next ten years and we need to position the organization now in preparation.
-- Customs resources are not unlimited and therefore must be prudently managed.
-- The importing community is entitled to the most efficient form of merchandise processing and must have efficient

processing in an era when time management translates to money management.

In recognition of these truisms, and in taking account of increasing technology changes in the International trade environment, Customs must develop innovative systems and procedures to keep pace with the constituency it must serve.

In many ways, these proposals are follow-ons to the significant progress we have made in such areas as automation, electronic processing and paperless entry. Logically then, we should capitalize on past successes. The problem now is that we have taken our progress about as far as we can under the existing statute framework. Put another way, we have made our progress under antiquated laws, some of which literally go back to the days of sailing ships.

Further enhancements and additions to our past accomplishments will benefit both Customs and the trade community, but the legal basis must be in place, The proposals we are working on with Treasury can be grouped into several major subject matter areas:

-- Electronic Processing
-- National Entry Processing
-- Marking requirements
-- Record keeping
-- Administrative -- such as liquidation periods and fines and penalties authorities

In developing this package, Customs sought opinions and advice from various quarters of the trade community and we will continue to follow this path of consultation. It is through this consultation that we will develop a better appreciation for each other's mission needs in a more modern and vastly different cargo processing environment.

Much of the substance of this set of modernization proposals is very technical so I will not attempt to go through it point by point. In any case, it is not yet an administration-sanctioned package. Nevertheless, we will, hopefully in the near future, provide you with a list of statutes which need updating and the relevant background history and analysis necessary for your scrutiny.

Mr. Chairman, I must tell you that as I have talked with my appropriate experts on the subject of modernization, I am more and more convinced that the old statutes which have served Customs purposes in the past 200-odd years are in need of a significant overhaul. We intend to continue to work in that direction -- with this Committee, with our superiors at the Treasury and with the trade Community. Toward this end, I appreciate this Committee's offer to assist us in modifying the statutory framework to accommodate full electronic processing of Customs commercial transactions.

Mr. Chairman, in closing my remarks, and as a new Commissioner, I want this Committee and the trade community representatives here today to leave this hearing with the assurance that the Customs Service believes in the goals which you and the trade seek because we all seek those goals. We will, at times, disagree on the paths to get to the goals because of our different roles in the process. Nevertheless, I will tell you that Customs will work with you as best we can to continue to move the organization in the direction of enhanced mission performance.

That concludes my statement. I will be happy to answer any questions you have.

Chairman GIBBONS. Thank you, Madam Commissioner. You have certainly got an ambitious agenda laid for us.

[Additional questions for the record from Chairman Gibbons to Customs and their responses follow:]

Question. We understand that you are proposing legislation to make the Merchandise Processing Fee (MPF) GATT consistent. Tell us how your proposed legislation addresses these two concerns.

Answer. The fee schedule proposed by the Administration is based on the President's FY91 budget proposal. To arrive at a GATT consistent commercial operations budget figure, Customs reduced the $638 million commercial cost figure contained in the President's budget by approximately $65 million in passenger processing, international operations, and export control costs. Additionally, Customs increased the total by $38 million to reflect the commercial cost of overtime processing. This results in a GATT consistent commercial operations figure of $611 million.

The cost of processing was derived by taking the national direct and indirect commercial costs, national workload figures and available manpower distribution data as the bases for developing the per entry costs and projecting them for FY91. The informal entry costs of $11 and $14 for automated and manual informal entries, reflect a transaction-based approach for 5.1 million entries. For formal entries and releases, Customs was faced with the problem of developing a GATT consistent user fee that at the same time would minimize the adverse impact on the importing trade community. Two previous attempts to obtain passage of a user fee bill had shown that both the GATT issue and the import impact issue had to be addressed to gain passage of user fee legislation. Under the current MPF the high value importers are subsidizing the low value importers.

To address the GATT and import issues, Customs used available workload data combined with operational estimates to develop the minimum ($20) and maximum cost ($400) figures for FY91. These estimates impose a transaction-based fee on approximately 55%, or about 6 million entries, of the estimated 10.8 million entries and releases for FY91. The other 45% would be subjected to an ad valorem fee of .15%. For manually filed entries an additional $3 surcharge would be assessed.

Question. We understand that you lack data to support your estimates of the total costs that would be recovered through the MPF. To prevent overcharging or undercharging the importing community who pay the MPF, what plans do you have to better support the total cost of processing imported merchandise?

Answer. Customs believes it has sufficient data to determine what it will recover in MPF revenues. What has come under question is whether or not Customs commercial cost figures can be supported. Except for a portion of the inspection and control costs the other costs associated with commercial costs are supportable. Operational estimates were used to determine the inspection and control costs. Notwithstanding this, we are satisfied that the importing trade community will not be burdened with excessive costs. To put it into perspective, H.R. 1594 as passed by the Senate will raise approximately $450 million as compared to an estimated $748 million under the current fee for FY90.

To date Customs has no plans to alter its cost justification. Customs may address the cost analysis issue through a sampling technique, such as has been discussed with GAO, or use the Department of Agriculture personnel system to track employee time when that system is available in FY92 or FY93.

Question. Your proposed legislation will continue to charge the MPF based on the value of merchandise with upper and lower limits. How does this change address GATT concerns that an acceptable MPF must be based on the approximate cost of processing an importer's individual shipment.

Answer. The issue will turn on whether or not the proposed fee schedule is considered to approximate the cost of processing individual entries, if it is challenged in the GATT. We have looked at both transaction-based, ad valorem and combination transaction and ad valorem fee schedules. None of them will give you the cost for a specific transaction except by chance. The reason for this is that none of them will yield, in all cases, a precise cost. The reason for this is that any given imported commodity or group of commodities can be subjected to everything from an intensive examination to a cursory paperwork review, dependent upon the risk of the shipment for violations, manpower available at any given time, automated profiling instructions, the ease of examination and availability of samples for analysis, if required, the knowledge of the inspector and import specialist dealing with the shipment, etc. The Administration has determined that the $20–400 range does approximate the cost of processing and that it is GATT defensible.

Question. What kind of hard data are you going to be able to give the USTR so that it can effectively argue before the GATT that the MPF changes address the question of linkage to the cost of processing individual shipments?

Answer. We will be able to provide USTR with the following data: National budget costs for commercial processing, Informal and formal entry workload data, National examination rate data for formal and informal entries, Distribution of formal entry data by value, Labor distribution of operational costs projected to FY91, and Cost data on exemptions.

Question. The GATT also was concerned that the MPF generated more revenue than needed to cover all the costs of Customs commercial operations and, for Fiscal Years 1988 and 1989 combined, Customs estimated that these excess revenues totaled about $235 million. GATT agreed with the United States' solution to reduce the fee in subsequent years. How do you plan to address this issue?

Answer. The GATT panel recommendation stated: *"the Panel suggests that the contracting parties recommend that the United States bring the merchandise processing fee into conformity with its obligations under the General Agreement."* The U.S. is therefore required to adjust the fee to meet its obligations. As a consequence, Customs will recommend adjustments, based upon policy guidance within the Administration, to the Congress at a legislatively prescribed reporting point, once we know what the fee schedule will be and if there is a policy decision to adjust for these collections.

Question. Is there any reason why similar interest could not be collected and paid on underpayments and overpayments of estimated duties?

Answer. One of the proposals in the Customs modernization package accomplishes this. Differences between duty deposited and duty assessed on liquidation would be refunded or billed with the addition of interest from the date of original deposit.

Question. Is there any reason why Customs would not be willing to promptly institute such an "early warning system" to improve the collection of estimated duties?

Answer. I presume that this question asks if Customs is willing to give surety companies timely notice of potential liability for duty, and other financial obligations. The answer is "yes".

Customs has taken the following actions to satisfy the requirement for timely notice to surety companies of potential and actual obligations:

Current surety information provided on a tape, weekly, to any surety company subscriber ($100/week):

1. Name & address of all principals and users of continuous bonds, which are active for the surety company subscriber.
2. All open entries on file for the subscribing surety company, plus all new entries filed during the previous week or changes in status of existing entries.
3. A record of all entries processed for liquidation in the preceding week, for which the company is the surety of record.
4. All open bills for which the identified company is the surety, plus all new bills issued during the week.
5. All bills paid or cancelled during the week. Complete records are provided each week.
6. All open fines and penalty cases, plus a complete weekly record of all new cases or changes in status of cases in the previous week.

Planned Automated Surety Interface. The planning of an automated surety interface is underway with Customs, surety companies, and brokers participating. This project was given priority scheduling by the Customs ADP Steering Committee and will be implemented in phases as surety capabilities are developed.

1. Surety verification of all obligations for entry transactions covered by a single entry bond, prior to release.
   - Entry data via Automated Broker Interface (ABI).
   - Data put in surety company queue.
   - Response from surety within 15 minutes, prior to release, with broker notification.
   - If not timely, broker notified of "no response" and cargo is held.
   - If rejected, entry is rejected and broker notified.
2. Automated Continuous Bond Filing Process.
   - Electronic submission & approval of continuous bonds.
   - Electronic submission of bond riders, corrections, and terminations.
   - Customs provides confirmations/edit results for each attempt to update Bond File.
3. Reports, Queries, and Power of Attorney.
   - Periodic reports showing bond usage as related to bond sufficiency.
   - Periodic reports of data now presented on tape.

Query of status of specific transactions.
Query of open & liquidated entries.
Query of Customs bill information.
Query of fines & penalties information.
Importer number & bond query.
File & revoke corporate Power of Attorney, with confirmation.
File and update importer name and address, with confirmation.

Question. Is there any reason why Customs could not employ independent contractors to locate, copy and mail documents to sureties if the sureties agreed to absorb such expenses? Is there any reason why Customs cannot transfer files from its district offices to its regional offices after a demand for payment is issued, to facilitate inspection and copying by sureties?

Answer. Two court decisions in the past several years (American Motorists and Peerless) held that Customs is not responsible for providing copies of bonds and entries to sureties. All the data that is required is included in the demands made on the surety company. In fact, as prudent business, sureties should already have a copy of the bond. Copying numerous documents, seen by independent contractors, would create additional problems for Customs—that of limited resources stretched even further through extensive use of photocopying machinery, refiling of the documents, and general supervision and oversight of the contractors. The suggestion to transfer documents to regional offices would also create significant problems. Anytime documents are transferred from one office to another the risk of loss in the mails, misplacement, etc., increases. Again, sureties should have records of the bonds they have written.

Question. Is there any reason why a protest should not be considered to have been "deemed allowed" if Customs fails to act upon it within two years from the date it is filed?

Answer. At the present time, if a protest is not acted upon by Customs within two years, it is deemed to have been denied. Customs still has the obligation to make a final decision on the protest and notify the protesting party. Often, this does result in the protest being allowed. We are in the process of establishing time frames for action by Customs Officers on protests. In the majority of situations, this will alleviate many of the problems discovered during our national Quality Assurance review of protest processing. Frequently, protests are not acted upon within short time frames for substantive reasons—pending action on related protests on the same issue, review required by another agency, e.g., Department of Commerce on antidumping/countervailing duty issues, court action on similar issue, etc. We are sensitive to the problem of delays in many of the protests we process and are taking affirmative action to correct it. Therefore, we do not believe it is necessary to impose a "deemed allowed" provision upon us.

Question. Is there any reason why a petition filed to contest an assessment of liquidated damages should not be "deemed allowed" if it is not decided within two years from the date it is filed?

Answer. For liquidated damages cases solely within the jurisdiction of the Customs Service, this is not an unreasonable requirement. However, Customs enforces importation requirements of many other agencies including Food and Drug Administration, Consumer Product Safety Commission, Environmental Protection Agency, Department of Transportation, Federal Trade Commission and the Department of Commerce. Customs is required, by regulation in many cases, to seek the recommendation of the other agency before mitigation can be afforded. Customs ought not be held accountable for delays attributable to other agencies. Accordingly, Customs should be permitted to extend the two-year decision-making period should the case be outside our control.

The petitioning process is much less formal than the protest process. It is easier to control protests inasmuch as they must all be filed on CF-19's. Petitions, by regulation, need not be in any particular form. As such, problems might arise as to what documentation submitted to Customs actually qualifies as a petition for relief. The situation is foreseeable where general informational inquiries could be called petitions, thereby starting the two-year clock. The possibility of abuse exists without clear regulations defining the form of petitions.

Question. Is there any reason why Customs cannot establish uniform procedures regarding bankruptcy proceedings which will ensure prompt payments, while protecting the surety's interest in the bankrupt estate? Would Customs support a change in the bankruptcy laws which would grant priority status to a surety which has discharged the obligation of its principal to Customs?

Answer. Customs believes that procedures should be established to help ensure prompt payment by sureties while protecting their interest in the bankrupt estate.

For this reason, Customs would support a change in the bankruptcy laws which would grant priority status to a surety which has discharged the obligations of its principal to Customs. In fact, Customs is seriously exploring the possibility of effecting such a change administratively, by way of a regulation that would automatically assign Customs priority in bankruptcy to a surety that has discharged the obligation of its principal to Customs.

Question. Please give an exact count of Customs personnel in the Tampa, Jacksonville, and Orlando, Florida, districts broken down by Inspectors, Import Specialists, etc.

Answer. The staffing information requested is as follows:

TOTAL TAMPA DISTRICT STAFFING—ON-BOARD FULL-TIME PERMANENT POSITIONS, MAY 4, 1990

	Inspectors	Import specialists	Canine officer	Other	Total
District staffing: Tampa District Totals	45	9	1	38	93
Port staffing:					
Tampa	15	6		13	34
Jacksonville	12	1	1	6	20
Orlando	15			3	18
District staff/other ports: (Panama City, Pensacola, Port Canaveral, and St. Petersburg) Total	3	2		16	21

Chairman GIBBONS. Mr. Archer.

Mr. ARCHER. Thank you, Mr. Chairman.

Madam Commissioner, thank you for coming to testify before the Trade Subcommittee. I appreciate your efforts to improve the Customs Service. We have had a number of conversations over the last year.

I am still concerned about several items which we have talked about before, and the Oversight report does mention some of my concerns, particularly that the costs of Customs cargo exam program across the country are distributed inequitably. We have felt this for a long time in Houston. And we are worried about "port shopping" as I know you are concerned about that too.

The Oversight report particularly recommends that Customs be required to contract and pay for examinations and increase the Customs' user fee to fund examination costs nationally.

As it stands today, if you happen to be picked at random for examination, you pay significant costs and inconveniences, even if you are found to have not in any way been in violation of the law. And yet these processes go on. And so the innocent pay for the costs of the guilty, as it were.

A uniform Customs' user fee spread across the country, nationally, would, I think, go a long way toward solving this problem. But you mention that you primarily are going to rely on the trade community to identify the cost problems, and that that will be an effective way to control exam prices.

In the face of widely varying charges, how can this approach possibly work?

Commissioner HALLETT. Well, Mr. Archer, first of all, we do intend to have a review of this issue. In addition to that, we plan to have a task force which will study those costs.

But I believe as an interim step, having the input from the trade community so that we will be able to go directly to the root of the

problem will help us as we try to actually modify any differences from one part of the country to the other.

Certainly I guess the key point that I would like to make is that while in this fiscal year approximately $749 million will be collected under that ad valorem user fee, the Customs Service does not get one penny of that money. It goes directly to the general fund. And some could say that comes back to us in the form of our appropriations. But I don't believe the trade community feels that that is the case, so that creates a problem.

Now, the current system is obviously the ultimate in terms of user fees. And I think what we are really looking at right now is, yes, there is a cost difference from New York to Houston. But, at the same time, I think if we review this, then we will be able to come up with a new directive so that we may address the overall program. That is the best commitment that I can give you at this time.

Mr. ARCHER. Well, how can we ever possibly solve this problem without a uniform fee that applies everywhere? If exam charges vary from port to port, in spite of your surveys and your studies, isn't that going to affect the flow of trade and have an impact on port shopping?

Commissioner HALLETT. Indeed, I think that's probably the case. However, I think that it would probably take legislation to get the user fee to pay for these examinations.

Mr. ARCHER. Would you recommend that to the committee?

Commissioner HALLETT. I believe that that is probably the simplest and best response.

Mr. ARCHER. In your survey of nationwide costs, are you going to be able to determine a total cost figure so that we can know how much money needs to be put into the user fee in order to cover all of these costs?

Commissioner HALLETT. We will certainly ask the task force to try and give us overall cost information. I would assume that would be possible, but it will require substantial data from the trade community which is not now required.

Mr. ARCHER. I know in our area in Houston, some of the most troublesome charges are the charges for intensive drug exams, even if you are found to be clean and innocent. And is your survey going to cover those charges? They run up to $600 for a cargo in Houston.

Commissioner HALLETT. Mr. Congressman, it would cover all of that. We will truly try to not leave a stone unturned.

Mr. ARCHER. OK. And do you have a timetable as to when you report to the committee on your survey?

Commissioner HALLETT. Yes. We have already indicated previously that September is when we would anticipate that study will be back in.

Mr. ARCHER. As an extension of my questions, I would like to shift to another area, and that is that today there is no compensation for damaged cargo in these examinations.

So the shipper who, let's assume, is innocent, still has to pay for all of the damages to any cargo that occurs as a result of the examinations.

And in the Customs authorization bill, the House approved a requirement that you compile statistics on cargo damaged during the examination, report these to the committee, and then the Treasury is required to make recommendations as to what we should do relative to these damages.

How do you plan on implementing that requirement?

Commissioner HALLETT. Mr. Archer, it is a very cost intensive process because it is going to take a lot of information coming in from around the country.

We do not, at this time, keep a record at headquarters of that information. We have to go out to all of the various inspection stations and accumulate that information. We do have a team that looks at damaged cargo. In fact, we probably have to rely to a certain extent on being notified by someone when their cargo is damaged. We then go out and look at it.

The Coast Guard, I might point out, has a different way to compensate than we do. I am very sympathetic to this problem. I don't know whether there is a way in which we might, through the legislative process, be able to combine this. But I remain troubled by it.

On the other hand, the law as it currently stands, I believe, allows up to only $1,000 in reimbursement. And if we were to go beyond that $1,000, unless the funds were appropriated, it would, of course, come right out of our hide.

Mr. ARCHER. Well, we would be pleased to have your recommendations in that area. I have got a number of questions but finally, Mr. Chairman, one last short one.

The Oversight report recommends annual management reviews of each Customs' region district, and port.

Will this be done?

Commissioner HALLETT. I really believe that it is being done right now, Mr. Congressman. This is something that I in my management changes, have begun to address—first, by creating an Office of Assistant Commissioner for Information. This was done, in part, in response to the Pickle report.

We have had quite an overhaul in personnel and in changing the way we are doing business. This has included a much more aggressive effort on my part to communicate with all of the Regional Commissioners on a weekly basis to discuss such things as management problems, to make sure that they know what is going on in their districts and regions. I will continue this practice, and improve on it as is warranted, and along the lines in the Pickle report.

Mr. ARCHER. Mr. Chairman, I would like to submit some additional questions for answers for the record. One in particular relating to how you distribute your personnel for taking care of the airports' traffic in this country so that it is done equitably. But I won't take any more time of the committee at this time.

Thank you very much.

[The questions and answers follow:]

Q. Congressman Archer:

You state that you use a staffing allocation model for import specialists.

A. Please explain how this model works?

B. Please provide a description of this model for the record, including the mathematical formula and statistical series used.

A. Commissioner Hallett:

The Import Specialist Allocation Model allocates available staffing according to the proportionate share of workload. That is, it does not determine how many import specialists are needed to do the work. It instead, determines the percentage share of the available import specialists to be allocated to each location based on the percentage share of the total workload that is performed at that location.

The model identifies the basic workload and trade programs for which the import specialist is responsible. Two basic requirements in determining whether or not a factor should be used are:

1. Factors must be measured by an automated system. Manual and self count measuring methods are not reliable and should not be used.

2. The count should be significant enough that it would make a difference.

Presently, the factors used and the weight assigned to each are:

1. Number of Review Entries - weight 1.0 - The number of entries bypassed, since they are not seen by the import specialist, are deducted from the total entry volume. This is the basic unit of work and is given a weight of 1. All other factors are weighted in relation to this. That is, a factor of 3 means that to process that workload takes 3 times as long as to process a basic entry.

2. Quota/Visa Entries - weight of 3.0 - A quota /visa entry gets an additional weight of 3.

3. ADA/CVD Entries - weight of 1.0

4. 9802.0040/50/60 Entries - weight of 1.0 - Entries covered by this Harmonized Number represent additional work with a weight of 1.

5. 9802.008050 Entries - weight of 1.0

6. TPM Transactions - weight of 1 - This represents workload generated by merchandise subject to steel VRAs.

7. Protests - weight of 1.5.

The count for each of these factors for each location is multiplied by the weight. The total represents the equivalent entry count for that location. This adjusted entry count is then multiplied by the complexity factor to arrive at the total entry equivalent for the location.

The complexity factor is based on the number of brokers and large importers that do business at that location. The complexity factor is calculated by assigning the location with the least number of brokers a factor of 1.00. Each time number of brokers doubles, the factor is increased by .10 points.

The total entry equivalent for all locations is added to arrive at a national total entry equivalent. The total entry equivalent for each location is divided by the national total entry equivalent to arrive at the percentage share of workload for the location. That percentage is the percentage of available import specialists allocated to the location.

National Import Specialists and Supervisory Import Specialists are set aside and are not part of the model since they do not process entries. The model is a regional model with district figures advisory only to be used as a management tool. Local conditions may dictate that adjustments be made to allocation lower than regional level.

Q. Congressman Archer:

I have long wondered how Customs determines where to assign inspectors, especially for air passenger processing. In your response to the Oversight report, you state that you use staffing allocation models for the inspector force, and for the import specialists. Please explain how these models work?

A. Commissioner Hallett

The allocation model used by the Office of Inspection and Control is produced on a standard LOTUS spreadsheet. It was originally evaluated and developed from seven previous models and finalized by a working group consisting of representatives from each of the seven Customs regional offices in June 1988.

In order to explain how the model works, it is necessary to define its three basic components:

Workload Statistics: The raw workload data such as the number of vessels arriving in the United States, number of Customs declarations collected, number of merchandise entries that Customs released, and so forth.

The Allocation Basis: For each type of workload activity, a selected group of regional staff officers determined from a review of ports of entry staffing and workloads, how many units of a particular task should be accomplished in one year by one inspector. For example, one inspector should be able to accomplish a primary inspection on 175,000 vehicles at the northern border during one year. The process of "reverse engineering" for determining these ratios was used throughout. Basically, it consisted of ascertaining which ports of entry were considered efficient, assuming this to be true, and then comparing that port's workload to its manhours spent on each task, thus arriving at ratios of what "should be". It was left to a rebuttal to change the basis. The committee which developed the model recognized that these ratios were not validated.

Allocatable Positions: The number of positions (inspectors) to be distributed among the seven Customs regions.

A. Commissioner Hallett (answer continues):

The model's most fundamental raison d'etre is to digest two factors, raw workload statistics from each of seven Customs regions and an allocation basis and, as a result of combining these factors, distribute "X" number of positions to each one of the Customs regions. To use the model an operator must input two variables; workload statistics from Customs Form 16, Workload Summary Report and the total number of positions to be allocated. The allocation basis is considered a constant until it is no longer valid (due to changes in national priorities, technological changes improving efficiency, etc.). The software's calculations then will distribute the positions to the various regions.

The Office of Inspection and Control had developed this model as a guideline to assist Headquarters in determining allocation priorities and to identify areas of possible reallocation. However, in the recent years Congress has specified the allocation of new positions precluding any direct use of the Inspection and Control allocation model.

Q. Congressman Archer:

Please provide a description of these models for the record, including the mathematical formulas and statistical series used.

A. Commissioner Hallett

I am submitting to you two printouts of sample allocation models as well as a diskette containing the two spreadsheet files. All the mathematical formulas and statistical series used can be found in the cells of the spreadsheet.

Q. Congressman Archer:

The oversight report was critical of the fact that Customs really doesn't know the actual break-down of resources between commercial and non-commercial activities. As you know, that is important to live up to our GATT obligations under the user fee. The report recommends that you conduct an annual workforce and workload analysis. Your testimony refers to a plan for a preliminary analysis of Customs workforce activities.

A. When will you conduct the survey?

B. Will you use statistically valid methods? Please explain the methodology that will be used?

C. Will you report the results to the Committee? When?

D. Will you use the survey to update Customs budget categories and user fee information?

A. Commissioner Hallett:

Customs will initiate a three-part workload analysis of the Inspection and Control (I&C) workforce in June 1990. The results of these efforts will be reported to the Congress and will be used to update information for the Customs budget and user fees.

The initial review will analyze available data to estimate overall I&C productivity (commercial and enforcement) for all regions and districts, and for selected ports. This will involve using statistical inference (regression analysis) to compensate for missing data concerning the distribution of I&C labor among commercial/enforcement activities. It is estimated that this will take approximately twelve weeks to complete this part of the task.

After this analysis is complete, the field managers will review and evaluate the initital results to identify weaknesses in the analysis that may be caused by missing data, workload factors, or performance measures. We anticipate that it will take approximately five weeks to complete this evaluation.

After completion of this analysis, Customs will design and conduct field surveys for missing information, to be incorporated into the productivity analysis. It is estimated that it will take approximately 16 weeks to complete this phase of the workload analysis. After management approval of the productivity analysis, a valid methodology for annual reviews will be designed so that the initial analysis can be updated.

In addition to this research methodology that will be used to evaluate inpection and control activities, Customs is also reviewing alternatives for conducting a full workforce analysis of each employee's typical workday. This analysis will be used for collecting data on various aspects of the Customs workforce. A questionnaire will be designed which will obtain data on tasks and characteristics of the Customs workforce. The data will then be analyzed to determine consistency with other workload measurement devices.

Q. Congressman Archer:

Will you perform annual management reviews of each Customs region, district, and port to ensure uniform Customs enforcement and management policies, as the Subcommittee recommended?

A. Commissioner Hallett:

Yes, Customs does intend to ensure uniformity in enforcement and management policies through a continuation and expansion of existing review practices. During the past 12 months we have conducted over 40 reviews regarding management: 23 examined reorganization proposals, 14 concerned headquarters staffing and alternative management practices, and nine reviews concerned program performance and field operations.

The upcoming review of Inspection and Control (I&C) will contribute toward uniformity in evaluating I&C performance and staffing for commercial and enforcment activities at the region, district, and port levels.

Customs' various functional organizations in addition to its formal internal control review process also place an emphasis on developing uniform procedures and policies and assessing uniform and effective implementation. For example, management reviews are continuously performed on field laboratory operations to ensure uniformity of technical results and to ensure that management policies and priorities are properly executed. Programs to accomplish these tasks include: monthly review by Headquarters of field operations reports; monthly quality assurance testing through interlaboratory sample analysis and/or laboratory report reviews; Headquartes staff visits to all field laboratories at least annually; and periodic audits by the Office of the Inspector General.

Customs will continue to use its exisiting organizations to conduct assessment and management reviews which will be of use to management for assuring uniformity.

Chairman GIBBONS. Thank you. The airport traffic is a big, big problem for all of us.

Mr. Pickle.

Mr. PICKLE. Well, I thank you, Mr. Chairman. And Commissioner Hallett, I appreciate your testimony. And our committee will enjoy working with you.

Commissioner HALLETT. Thank you.

Mr. PICKLE. Now, you have listed a lot of plans that you have in mind to implement when the report was made. And I will be anxious to see the plan that you actually decide you are going to use to implement it.

And I am also interested in working with you with respect to the legislation that you say that you and Treasury are working on.

I might add that I've noticed that one of the industry groups has recommended some legislation, and I believe that the committee is going to probably prepare its own legislation. But at least we are all cognizant of the fact that we must do something. And I am looking forward to that.

Now, I have got a couple of questions I want to ask you, more specifics. One is in the area of what I call uniform port enforcement strategy. The difference in the degree of investigations that various ports have over the country. We noticed in some ports, they are very tough in some areas and kind of lax in others. And we are trying to be sure that every port has the same degree of intensity of examination as the next port. I will give an example.

We have noticed that there was a great disparity in the kind of examination you have in two ports, like in Seattle and in Los Angeles. Customs' cargo examination rate in Seattle is 12 percent, and in Los Angeles it is 8 percent. And if you happen to be importing from Asia, where there is a much greater likelihood for being examined for narcotics in Seattle than it would be in Los Angeles because of that disparity. In spite of the fact that there have been no narcotics found in Seattle for the last two or three years. It would appear on the surface that an importer would say it is easier to get our goods in at Los Angeles than in Seattle.

Now, we have to be on guard against that. What do you plan to do? I notice, Mr. Chairman, you have introduced one approach in the bill that the committee had approved in March. What else can you do, and what are your plans to try to correct that?

Commissioner HALLETT. Well, first, Mr. Chairman, I would point out that ports certainly vary from one to the other, and obviously Miami has different problems from Los Angeles, for example. In terms of the kinds of drug coming in Seattle, the hashish and heroin traffic is substantial, and there is a significant threat. For example, in fiscal year 1989, huge amounts of hashish were seized in Seattle. While this was off of private vessels, it indicates a "threat in the area" so to speak. Certainly container trafficking is harder to detect, but we must assume it too is a viable or live threat, given the trafficking patterns we have seen in the last couple of years.

It is somewhat the same in terms of the functions of each port. Another point is that Los Angeles has considerably more shipments than Seattle, for example. In terms of a percentage of shipments inspected, Seattle would have the higher percentage because

more of its fewer shipments are inspected than is the case in Los Angeles. Also, less time can be devoted to inspection in Los Angeles than in Seattle.

Mr. PICKLE. Now, are you having any trouble getting personnel to go to Los Angeles?

Commissioner HALLETT. There is a serious cost of living problem in Los Angeles-Long Beach, much like in New York. To be able to get the necessary number of people to take jobs in those high cost of living areas makes our job more difficult.

Mr. PICKLE. Well, Commissioner, this is not a new problem in the world of realities. In the court systems, a lawyer always wants his case to go to a certain judge to be tried. But we have a presiding judge who tries to regulate that. And we in the Congress are guilty of the same thing. If we want to get a bill that we want to act on, we will get it drafted in a way that it was referred to this committee, if we can. A very normal approach.

But I say to you that you must establish some kind of a plan to be sure that one port is not being favored over the other.

Let me hurriedly go with another question, because I noticed in your report to me, you didn't address much the issues on the financial question.

Now, after we made our report, we received a GAO report on Customs prenumbered receipts. The GAO report said that Customs had lost track of 5 million of these prenumbered receipts, and that they changed it later, your people did, from the unused to the used receipt in spite of the fact that the receipts were serially numbered.

Now, we asked the GAO to go back and make a report to you about those 5 million prenumbered receipts. And I understand that this week the GAO did make that report to you.

Have you received it?

Commissioner HALLETT. Yes, Mr. Chairman.

Mr. PICKLE. And what did that report find, and what did they recommend?

Commissioner HALLETT. Well, first of all, the report does a number of recommendations that we are looking at now. I cannot tell you that we don't have a plan put together yet. We just received that report the day before yesterday. But I can say that we are in the Customs working on an implementation plan, and we will follow up on every single one of the GAO recommendations. You have that commitment from me.

And certainly a new way in which we will do this type of business will be put in place. But that is the best I can tell you at this time.

Mr. PICKLE. Well, I think that's a serious problem. You have got 5 million of these reports that were changed from unused to used. And I understand that somebody in the field said, well, this looks better if we just change it as if it was ripped off the books so that it wouldn't look so bad on the next examination. And somebody apparently just arbitrarily said we are going to change that receipt.

Now, that's grounds for a lot of embezzlements or a lot of violations that could cause great trouble. And if we just allow that to happen rather cavalierly, that's a serious violation. And I think

you ought to give us a complete report about how you are going to handle that problem.

Commissioner HALLETT. You have that commitment, Mr. Chairman.

Mr. PICKLE. All right. Thank you.

Chairman GIBBONS. Mr. Schulze.

Mr. SCHULZE. Thank you, Mr. Chairman, and thank you, Commissioner, for your testimony and your cooperation.

I would like to concentrate for a moment on seizure authority. Commissioner, would you elaborate on the changes made by Customs in the area of seizure authority under 19 U.S.C. 1595a(c)? Also, what prompted these changes to be made administratively? And do you feel that they address the concerns of the different views or different sides of this issue?

Commissioner HALLETT. Mr. Schulze, first of all, I think that it is appropriate to say that the Customs Service did have a problem. We were overzealous, but we have mitigated that overzealousness. We are listening to the trade community, and we are aggressively acting to try and correct the problems.

I would also say that I think it is important that we are working in concert with the National Treasury Employees Union to conduct a survey that will determine what is going on in this area, and I think that will be important. And that joint survey will be due some time in June, and we will certainly get that information to you.

I think that we are very cognizant of the problem and are working, as I say, strenuously to try and improve it.

Mr. SCHULZE. Specifically, would you give us, the subcommittee, some of the details of the changes that were made administratively?

Commissioner HALLETT. Well, first of all, we have now involved both the regional commissioners and the district directors to have a hands-on role in trying to identify these problems. And I might say that, frankly, your report was one of the reasons for our doing that. We have already tried to respond to this because of the report. We can make that necessary change. The other thing is that we have to maintain a better monitoring of the seizures to ensure that seizure activities are reported on a regular basis to management, and to you as well.

Mr. SCHULZE. Well, you have moved to relieve or alleviate some of the problems, some of the complaints that have been made, and it just seems to me that we ought to give that process an opportunity to work. I understand that one of our witnesses later on in the day will be putting forth a legislative proposal to revamp your new seizure policy. It just seems to me that we ought to give your present policy an opportunity to work.

I want to get your thoughts on it. Do you think we should change it legislatively, or should we give you a little time and see if you can make your new policy more effective?

Commissioner HALLETT. I believe that at this time, to make a legislative change would not be good for us, but I certainly think that it is important to point out that we are publishing several memoranda and Customs directives on seizure policy under 1595a(c). In terms of the initial guidelines, they were released on March 27,

1987, and I think that with those guidelines and subsequent guidelines that have been specific with respect to marking, but textile and steel overweight areas, we are going in the right direction.

Mr. SCHULZE. So you feel we should give a little time to let these new policies be implemented.

Commissioner HALLETT. Absolutely. We would appreciate that.

Mr. SCHULZE. Any idea how long that would take?

Commissioner HALLETT. Well, I don't know. Right now, we are conducting training in the field so that our personnel are more involved and aware of what is going on in this area—specifically in the areas of commercial fraud as well as seizure policies. And I think that we need to give it some time. I would like to ask that we keep in touch with you on a regular basis on this and come up with a time jointly.

Mr. SCHULZE. I think you should also plug in with the Trade Subcommittee and make sure that they are aware. Because if legislative proposals are bouncing around, you have got to take a position on them, and you have got to give us a reason why we should either implement them or not implement them.

Commissioner, one area of particular concern to me and an issue addressed by finding No. 13 of our Oversight report is the Customs role in collecting antidumping and countervailing duties. Would you describe Customs proposals to enhance your duty collection efforts and to better determine what percentage of these duties that should be collected are actually finding their way to the Treasury?

Commissioner HALLETT. Well, first of all, we have a new antidumping module that actually went into effect on the January 29 of this year, and it now provides a system to ensure that antidumping and countervailing consumption entries are properly processed against the Commerce data base. I think that is a very important first start. This was done after a 1-year testing period, and now we are phasing in the implementation, so I think we are on the right track on this.

Mr. SCHULZE. When this is implemented, will you be able at any point to give to the Trade Subcommittee a report on the status of the collection of these duties and where they are being collected?

Commissioner HALLETT. Yes, absolutely.

Mr. SCHULZE. Then I presume it would not be inconvenient to make an annual report to the Trade Subcommittee on this area. I may ask for that later on; I am just thinking about it now.

Commissioner HALLETT. Well, we will do it no matter what. I think that it is important, and it certainly is very much within our capability.

Mr. SCHULZE. Thank you, Commissioner.

[Additional questions for the record from Mr. Schulze to Customs and their responses follow:]

THE COMMISSIONER OF CUSTOMS

WASHINGTON, D.C.

June 15, 1990

Dear Congressman Schulze:

The enclosed material "for the record" is submitted to you in accordance with your letter of May 7 (which was received May 14). By verbal agreement, your staff extended the due date to today to be congruent with the submission of the record material to the Trade Subcommittee.

The material enclosed is composed of those questions submitted to Customs (to date) to be answered for the record, and items which Customs volunteered to provide. The specific items enumerated in your May 7 letter are marked so as to set them apart from the rest of the record (which has been submitted to the Trade Subcommittee).

If you have any questions, or need further information, please let me or my staff know.

Sincerely,

Carol Hallett

Carol Hallett

The Honorable
Richard T. Schulze
Ranking Minority Member
Subcommittee on Oversight
Committee on Ways and Means
House of Representatives
Washington, D.C. 20515

Enclosure

Q. Congressman Schulze:

Information on reforms to Customs 19 U.S.C. 1595a(c) enforcement policies, and an analysis of JIG proposal for 1595a(c) statutory change (H.R. 4689).

A. Commissioner Hallett:

1. Reforms to Customs enforcement policies under 19 U.S.C. 1595a(c).

Within the last year, the following changes have been made to Customs policy regarding its use of U.S.C. 1595a(c):

- o Customs Directive 4400-10 was issued on August 11, 1989 (copy attached).
- o Customs Directive 4400-10 modified Customs Directive 4400-07, by establishing the following new policy for section 1595a(c) seizures in cases involving non-serious violations:
  - --- In cases where the violations are not intentional nor repetitive, alternatives to immediate seizure should be considered prior to instituting seizure.
  - --- The alternatives to seizures include: (1) denial of entry; (2) release of merchandise under bond to ensure compliance with restriction violated; (3) allowance of warehousing of shipment; and (4) exercising discretion not to seize even when repetitive or intentional violation. In such instance a monetary penalty may be assessed.
- o The policy established under Customs Directive 4400-10 has resulted in positive feedback from the importing community, as is reflected in an article published in the Customs and Trade Law Journal entitled: "Customs Moderates Its Policy on Seizures--A Kinder and Gentler Customs Service (copy attached).

2. Analysis of JIG proposal for 1595a(c) statutory change.

Under the JIG proposal, 19 U.S.C. 1595a(c) is proposed to be amended to exclude from the scope of the forfeiture provision:

> "merchandise which could be subject of a civil penalty under section 1592 of this title."

The above proposed exclusion from the scope of section 1595a(c), is entirely too broad. Almost any merchandise seized under section 1595a(c) "could" be the subject of a civil penalty under section 1592. If either the importer or exporter "enters, introduces, or attempts to enter or introduce" merchandise into the commerce of the United States by means of material false statements, false acts, or omissions and such person either was negligent, grossly negligent, or fraudulent, a basis for a penalty action under section 1592, has been established.

In the case of United States v. Priority Products, the Court on International Trade provided instructions to the jury that a finding that a "false act" under section 1592 was committed by the defendants, could be returned, if they found that the defendant attempted to enter 200 cartons of Pau D'Arco tea that previously had been refused admission into the commerce of the United States at the port of San Francisco. In that case, there was neither a "false statement" nor "omission" in connection with the attempted entry of the tea. Thus, it is conceivable that any time restricted or prohibited merchandise has been introduced into the commerce of the United States contrary to law, a "false act" can be alleged to have been committed under section 1592. Even if there exist culpability of only negligence, there "could" exist a basis for a penalty action under section 1592.

With such clear possibilities for a section 1592 penalty action, however, seizures of such restricted or prohibited merchandise under section 1595a(c), for having been introduced into the United States "contrary to law", would not be permissible under the JIG proposal for amendment to section 1595a(c).

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POLICIES & PROCEDURES MANUAL

CUSTOMS DIRECTIVE

NUMBER: 4400-10

ISSUE DATE: August 11,1989

SUBJECT: Policy Regarding Seizures Pursuant to 19 U.S.C. 1595a(c)

1. PURPOSE

To set forth Customs policy to require consideration of alternatives to seizure under section 1595a(c), for certain importations made contrary to law.

2. BACKGROUND

Under Customs Directive 4400-07, Customs established the general policy for the application of the seizure authority under 19 U.S.C. 1595a(c) in cases where 19 U.S.C. 1592 also may be applicable. A recent survey has revealed that a number of seizures made under Section 1595a(c) were remitted without payment of any penalty. Such remissions were made primarily because of one of the following reasons:

a) It was determined subsequent to the seizure that the importation did not involve a violation of law;

b) Although technically there was a violation of law, seizure as a remedy was contrary to a Headquarters policy; or

c) The violation, itself, involved a very technical question of law, and there was no evidence that it was intentional.

This has led to the concern that the alternatives to seizure were not explored fully prior to the institution of the seizure action. Since seizure represents a severe penalty, alternatives to seizure should be fully examined before taking the step of seizure. These alternatives include denying entry, releasing merchandise under bond, permitting a warehouse entry, and assessing monetary penalties under 19 U.S.C. 1592 and 1595a(b).

It, however, shall remain Customs policy to make immediate seizures of merchandise pursuant to 19 U.S.C. 1595a(c) or other appropriate laws for very serious violations such as those affecting health and safety (e.g. importations of

contaminated food products), importations bearing counterfeit trademarks (pursuant to 19 U.S.C. 1526), piratical copies of copyrighted material (pursuant to 17 U.S.C. 603), imported merchandise bearing false designations of "United States" as the country of origin, or merchandise imported with counterfeit visas. In addition, shipments which are imported in violation of Foreign Asset Control (FAC) embargoes may be seized in accordance with appropriate directives and instructions.

3. ACTION

To assist in the determination of whether seizure under Section 1595a(c) is the appropriate remedy under the circumstances presented, the following policy has been adopted.

A. Denial of Entry

1. When merchandise presented for entry for consumption is found not to comply with all legal requirements for admission into the United States, in the absence of evidence that such manner of noncompliance was repetitive or intentional, the initial step to be taken by the appropriate Customs officer, shall be the denial of release of the shipment from Customs custody, pursuant to the authority under 19 U.S.C. 1499.

2. The importer of record or its broker/agent shall be notified electronically or in writing of the decision to deny release of such shipment, within five business days from the date of such decision.

3. Pursuant to 19 U.S.C. 1514, the importer may protest Customs action to deny entry or release of the subject shipment.

4. If entry for consumption is denied, the importer may be permitted to export the merchandise under Customs supervision or, in some cases enter it into a bonded warehouse or a Foreign Trade Zone.

Examples of Circumstances where Denial of Entry, Instead of Seizure, is Appropriate.

--- Unintentional and Non-repetitive Misclassification and/or Misdescription of Textiles Subject to Quota/Visa Restrictions Under the Bilateral Textile Agreements.

Importer X attempted to enter a shipment of garments described and classified as ladies'/unisex shirts from Hong Kong under a visa for textile quota category 639. The examining Customs Officer determined that the articles were properly classified as men's shirts, for which a category 638 visa was required. Thus, there is cause to believe that the shipment was introduced into the United States contrary to the bilateral textile agreement between the United States and Hong Kong.

If Customs had not notified Importer X prior to this shipment that the articles were properly described and classified as men's shirts, and there was no evidence that the misdescription/misclassification was intentional, the shipment should be denied entry and not seized.

If the importer files a protest which is denied, the merchandise still would not be admitted into the United States for consumption. Pursuant to 19 CFR 127.1(c), the district director could deposit the ladies' garments into a general order warehouse (if available) at the risk and expense of Importer X, or permit the importer to file a warehouse entry. If the correct visa is subsequently obtained, the shipment may be entered for consumption.

--- Violation of Other Agency Restriction Enforced By Customs.

An exporter from Brazil shipped tubes of toothpaste to a United States consignee in Baltimore on which the mandatory ingredient statements were printed only in Spanish and Portuguese, rather than in English. In that condition, Customs determined that the shipment most likely was considered to be "misbranded" and thus, in violation of the Food Drug and Cosmetic Act (FDCA). The Food and Drug Administration (FDA) was consulted to verify the suspected violation of the FDCA. After consultation with the FDA, and

a review of the records, it was determined that there were no prior violations of this type by the exporter or consignee.

This shipment of toothpaste should be denied entry for consumption, rather than seized under section 1595a(c), even though it has been introduced in violation of the Food, Drug & Cosmetic Act. The district director could place the toothpaste into a general order warehouse (if available) at the risk and expense of the consignee, or allow the importer to file a warehouse entry along with a request for permission to manipulate the shipment in order to correct the violation.

B. Release of Merchandise under Bond

1. Existing Headquarters guidelines relating to seizures for violations of 19 U.S.C. 1304 (country of origin marking requirements) and violations of Consumer Product Safety Commission (CPSC) laws, already set forth Customs policy to allow release of merchandise found to be in violation of these laws under the condition of the importer's bond which requires the redelivery of merchandise that is not or cannot be brought into compliance with United States laws. 19 CFR 113.62(d).

2. In other cases, if there is no evidence that the introduction of the merchandise into the United States contrary to law was intentional or constituted a repetitive violation of the same import restriction, and if the restriction is such that can be corrected outside of Customs physical custody, such merchandise shall be released under a single entry bond executed in accordance with 19 CFR 113.62, to secure compliance with the import restriction violated, instead of seized under Section 1595a(c). The bond should be in an amount equal to three times the value of the shipment since restricted merchandise is involved.

Example of Circumstances Where Release Under Bond, Instead of Seizure, Is Appropriate.

--- Unintentional and Non-repetitive Importation of Personal Computers In Violation of Federal Regulations

Importer Y filed a consumption entry for a shipment of portable personal computers from South Korea, without

including Federal Communications Commission (FCC) Form 740 (compliance certification), which under FCC law and regulations is required to be filed at the time of entry or withdrawal for consumption of any radio frequency device (which includes personal computers). There was no evidence of a prior violation of this requirement by Importer Y, nor did the record on hand establish that the introduction of the personal computers without the required certification was deliberate.

Importer Y should be allowed to file the required FCC 740 and the shipment should be allowed to be released under bond to ensure compliance with the FCC requirements. If further investigation reveals that the omission of the FCC form resulted from negligence or was deliberate, a penalty action can be initiated against Importer Y. If the personal computers are not brought into compliance with FCC requirements within the prescribed period of time, the merchandise can be recalled pursuant to the terms of the bond and allowed to be exported under Customs supervision.

C. Warehousing of Entry

1. Generally, merchandise subject to restrictions for admissibility for consumption in the United States, as opposed to prohibitions, may be permitted entry into a bonded warehouse or a foreign trade zone, upon the filing of a warehouse entry pursuant to the provisions of 19 CFR 144, et seq. or a Foreign Trade Zone application pursuant to 19 CFR 146.31 et seq.

2. In a case where restricted merchandise has been entered lawfully into a bonded warehouse or a foreign trade zone in accordance with the Customs Regulations, such merchandise shall not be seized for violations relating to such restrictions. In the case of a warehouse entry, the importer should be notified of any problems and given an opportunity to correct them before withdrawal for consumption.

Example of Circumstances Where Warehousing of Shipment Is an Alternative to Seizure

Warehouse Entry of Textile Quota Goods With Visa Reflecting Incorrect Weight of the Shipment

Importer X, who maintained the inventory for its wearing apparel business at a bonded warehouse, filed a warehouse entry covering men's bathrobes imported from the Peoples Republic of China (PRC), which included a textile visa covering this shipment. Customs conducted an intensive examination of the shipment inside the warehouse and discovered that weight of the robes was substantially higher than the visa. Importer X had not requested permission to manipulate the shipment while inside the warehouse for purposes of weighing the shipment. The shipment should not be seized. The importer should be notified of the weight discrepancy and should be allowed to obtain a corrected visa while the shipment remains in the warehouse.

D. Use of Discretion Not to Seize

1. If none of the circumstances described in this Directive as justifying an alternative action to seizure under Section 1595a(c) is found to exist in a given case, the Area/District Director always shall have the discretion not to seize.

2. In any case in which seizure would be permissible, but the Area/District Director has exercised his/her discretion not to seize, as another alternative to seizure, a monetary penalty may be assessed under 19 U.S.C. 1592, 1595a(b), or any other applicable statute against the violator.

4. EFFECT OF THIS ISSUANCE

A. This Directive supplements Customs Directive 4400-07, issued on January 26, 1988.

B. As of the date of this Directive, seizures in textile and steel overages cases involving overages of ten (10) percent or more shall be made only in accordance with the policy set forth in this Directive. Seizures for overages of less than ten (10) percent shall continue to be made in accordance with the criteria established under Customs Directive 4400-07.

C. This Directive, however, shall not a policy and procedures established fo Section 1595a(c), for the following:

(1) Marking violations, guidelines for forth in Customs Directive 4400-04, Memorandum (ENF 4-02.2 CO R:E:C 654, December 17, 1987, and in Headquarte dated December 8, 1988.

(2) Violations of Consumer Product Safety L laws and regulations, guidelines for wh forth in the May 24, 1988 Procedural Agr that was executed between the Office of I Operations and the Office of Inspection Enforcement Liaison, for the Customs Servi the Directorate for Field Operations, for t Consumer Product Safety Commission.

5. RESPONSIBILITIES

Area and District Directors will be responsible for ensuring that the provisions of this Directive are implemented uniformly within their local jurisdictions

Guidance concerning the application of this Directive may be requested from the Chief, Penalties Branch, Headquarters (FTS) 566-8317 or the local Regional Counsel.

The statements made herein are not intended to create or confer any rights, privileges or benefits for any private person, but are intended merely for internal guidance.

Commissioner of Customs

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CUSTOMS MODERATES ITS POLICY ON SEIZURES

A Kinder And Gentler Customs Service

David Serko & Barry Kaplan

ACTING Commissioner of Customs Michael H. Lane has issued a directive substantially altering Customs policy on seizures under 19 USC 1595a(c), which permits seizures of merchandise entered "contrary to law" (Customs Directive 4400-10, Aug. 11, 1989).

The policy should result in a "kinder and gentler" Customs Service.

Henceforth, Customs will "*require consideration of alternatives to seizure*" for other than "very serious violations such as those affecting health and safety . . ., importations bearing counterfeit trademarks . . ., piratical copies of copyrighted material . . ., imported merchandise bearing false designations of 'United States' as country of origin, or merchandise imported with counterfeit visas." Shipments in violation of Foreign Assets Control embargoes may also be seized.

The directive does not apply to marking violations, as covered by Directive 4400-04 (May 17, 1987), which already limited seizure to cases of international or repetitive violations. It also does not affect seizures alleged to arise from violations of the Consumer Product Safety Commission's laws and regulations.

Background

The Customs Service claimed that the addition of 1595a(c) to the Customs laws as part of the Anti-Drug Abuse Act of 1986 allowed it to seize any shipment of goods "introduced or attempted to be introduced into the United States contrary to law" and subject the merchandise to forfeiture.

The new directive should go a long way to correcting the serious problems which have existed in the enforcement program.

SERKO

Customs Directive 4400-03 (March 27, 1987) gave district directors discretion to seize steel or textile shipments subject to a quota by weight if the actual weight of the goods was 5 percent or more over the weight stated on the special steel invoice or visa. Goods with no visas or with counterfeit visas were also subject to seizure and forfeiture.

Customs Directive 4400-04 (May 11, 1987) set guidelines for seizures of merchandise not legally marked as to its country of origin at the time of entry, or subsequently undergoing allegedly illegal alterations of the country of origin markings. Unlike the guidelines for quota/visa goods, which were aimed at the goods themselves regardless of the importer's culp-

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ability or lack of it, the country of origin marking seizure guidelines required either evidence of intent to violate the law or of repeated disregard of prior Customs instructions as to marking, except in cases of false indications of origin.

These policies have continued in force since their adoption, but were softened somewhat within their first year of application, notably by raising the threshold for seizure of overweight quota shipments from 5 percent to 10 percent.

The New Directive

In Directive 4400-10, Customs now retreats significantly from the seizure policies of the past two years. It begins by noting that "a number" of cases were remitted without penalty. Customs is now concerned that such cancellations indicate that "alternatives to seizure were not explored fully prior to the institution of the seizure action."

The Directive lists possible alternatives to "denying entry, releasing merchandise under bond, permitting a warehouse entry, and assessing monetary penalties under 19 USC 1592 and 1595a(b)."

Denial Of Entry

As an alternative to seizure, if merchandise does not fully comply with the laws governing its admission into the U.S., *but there is no evidence of "repetitive" non-compliance or intent to violate the entry requirements*, Customs is now advising its officials in the field to deny entry under Section 499 of the Tariff Act of 1930 (19 USC 1499), which mandates the retention of merchandise in Customs custody if it does not "comply with the requirements of the laws of the United States." Importers are to be notified within five business days of the decision not to allow entry, and reminded of their right to file a protest under 19 USC 1514 against the exclusion. The goods might then be allowed to be re-exported.

The new Directive explicity allows Customs discretion "in some cases" (where the merchandise is restricted but not prohibited) to permit warehouse entries or Foreign-Trade Zone applications for goods not in compliance with documentary or other entry requirements relating to restrictions. In that posture, the importer can then take steps to remedy the defect (e.g., obtaining proper visas). For goods entered directly into bonded warehouses or FTZs, the Customs policy will be to affirmatively notify importers of problems, and give them a chance to correct them.

For country of origin marking problems, however, previously existing guidelines are to be followed: Goods not subject to seizure (lacking evidence of willful failure to comply with the marking statute) will be subject to Redelivery Notices under the importer's term bond allowing the importer 30 days to correct the defect. Goods evidencing intentional failure to comply with the marking statute or a continual pattern of non-compliance after notice from Customs are still subject to seizure.

Entry Under Bond

If the non-compliance involves correction of a defect which could ordinarily be accomplished by the importer outside of Customs custody, Customs now has discretion to allow release of the goods under a single entry bond in an amount equal to three times the value of the shipment to allow the importer to correct such defect.

"Discretion Not To Seize"

Even if a shipment does not fall within the types presented in the Directive, Customs "always shall have the discretion not to seize."

"Repetitive" Is Not Defined

Under the directive, seizures will continue in cases of intentional or repetitive violations. While the new Directive does not define the term "repetitive," a prior seizure Directive (Customs Directive 4400-07, Jan. 26, 1988) defines "repetitive" to mean two or more shipments *from the same source* within the previous year.

The Customs enforcement of 1595a(c) has been subject to much criticism. The new directive should go a long way to correcting the serious problems which have existed in the enforcement program, problems which were detrimental to the importing public and to the Customs Service as well. □

David Serko is legal editor of Global Trade and senior partner of Serko & Simon. Barry Kaplan is an associate in the firm.

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Q. Congressman Schulze:

Part of the proposed Customs Modernization legislation involves the "National Entry Processing", or "triangle processing" concept. This is where entries are filed at locations other than where the merchandise is released.

Isn't it premature to change the law to allow this, given that the problems that exist with current processing, especially with targeting cargo for violations (cargo selectivity), have not been fully addressed?

A. Commissioner Hallett:

National Entry Processing (NEP) will not have any detrimental effect on current processing. NEP will result in a substantial increase in the amount of electronic data which is available to Customs upon which to make targeting and selectivity decisions. Transactions which will qualify for NEP processing will normally be low risk because of increased pre-importation Customs advice and classification, and electronic data base certification. Overrides will be built into the system to cover those instances where enforcement concerns require that merchandise be examined at a location other than that which has been requested by the importer.

Q. Congressman Schulze:

Customs concluded a test of "triangle processing" last October. The process relied on fax machines and manual logbooks. The Customs evaluation said that the system did not "provide adequate internal controls", and "increased the possibility of unauthorized release of merchandise."

If it didn't work on a small scale, how can it possibly work nationwide?

A. Commissioner Hallett:

The test of triangle processing was not automated. This required the use of labor intensive manual processes for control purposes, while exposing Customs to unacceptable risks. National Entry Processing, which includes the Triangle Processing feature, was developed with this test experience in mind. It will be fully automated and will impose strict controls and audit trails over the release of merchandise.

Q. Congressman Schulze. When will the reports be available from the new ACS Antidumping/Countervailing Duty Module?

A. Commissioner Hallett. The new ACS AD/CVD Module went operational, nationwide, on January 29, 1990. The output to Commerce from this system will be in the form of a periodic data tape. The interval has not yet been chosen by Commerce, but is likely to be quarterly. At this time, specifications for this tape output are being worked out by Commerce and Customs.

We expect to create an initial test tape in early June. This test tape will assist Commerce to determine desired formats, while Customs will use it to identify any "bugs" in this complex AD/CVD system, so far undetected.

The test tape will contain AD/CVD entry information for entries filed after January 29, 1990. It will not cover liquidations or warehouse withdrawals, still processed manually. Warehouse withdrawals for consumption will be automated in early 1991. We are in the process of working out system enhancements for capturing and reporting entry liquidations by AD/CVD case number.

The date of the final version of the tape output will depend on how long Commerce takes to program to receive this output, evaluate it, suggest changes to the tape format and/or contents, and how long Customs takes to respond to these requirements.

During this process, Customs continues to make the enhancements to the AD/CVD Module, suggested by Commerce, Customs, and the trade.

Q. Congressman Schulze:

Your "modernization" proposal includes stiff new enforcement authority against marking violations in Foreign Trade Zones, and authorizes the use of private collection agencies, among other things. Why are these changes needed?

A. Commissioner Hallett:

With respect to marking in foreign trade zones, the present law does not cover marking in the zones. There have been abuses, such as the marking of sometimes shoddy merchandise as being of U.S. origin, and then exporting these fraudulently labeled goods to foreign countries. This provision extends the marking law and penalty provisions to such activities in the zones.

The use of private collection agencies by Customs is presently precluded by law. The collection of assessments and exactions which are unsecured by bonds has a low cost/benefit ratio and often evolve into write off positions. The use of private collection agencies operating on a commission basis would provide increased revenue to the government.

In general, provisions in the Customs Modernization proposal are intended to facilitate progress in automating commercial functions, reduce requirements for paper processing, and enable performance of Customs operations in a more businesslike manner. Present law is in many instances archaic and needs revision to support these goals.

Q. Congressman Schulze:

Please provide a detailed analysis of the proposals contained in the Joint Industry Group's proposed Customs legislation (H.R.4689).

A. Commissioner Hallett:

We reviewed the Joint Industry Group (JIG) bill and although we had difficulty in understanding some of the provisions and their intent as written, in general, we are in complete agreement with the thrust of the JIG proposals regarding the provision of authority to further implement and expand electronic processing. Similar provisions have been included in the proposed Customs Modernization Act. Electronic processing comprises a large and highly significant portion of both the JIG bill and the Customs proposals, and evidences a major area of agreement between the trade community and Customs regarding modernization.

With regard to the specific provisions of the JIG bill I would offer the following initial observations with the proviso that a more detailed presentation of the bill would be needed to permit us to provide a definitive response. Please see the attached analysis:

ANALYSIS OF JIG LEGISLATIVE PROPOSALS

JIG BILL PROPOSAL	IN CUSTOMS MODERNIZATION ACT (CMA)?	CUSTOMS POSITION
(19 USC 66) Provide full public notice and comment procedure where appropriate, prior to modification or revocation of an OR&R decision.	No	Oppose

ANALYSIS: This proposed JIG amendment appears to confuse the binding ruling process with the rules and regulations process. Subjects the entire ruling procedure to a lengthy administrative procedure which would severely slow down processing and be unduly cumbersome. We have been successful in speeding up this process. Sufficient recourse for adverse changes is presently available.

(19 USC 66) Establish a mechanism for formal administrative appeal of all prospective ruling decisions issued by OR&R.	No	Oppose

ANALYSIS: See note above.

(19 USC 1595a) Amend Section 596 to exclude seizures not involving controlled substances.	No	Oppose

ANALYSIS: Customs Directive of 8/11/89 covers alternatives to seizure. The seizure provision is critical to Customs enforcement efforts against other prohibited merchandise, such as drug paraphernalia, unsafe toys, and some IPR infringing merchandise.

(19 USC 1592) Codify the definition of the levels of culpability in fraud, gross negligence and negligence.	No	Oppose

ANALYSIS: Redefinition/clarification policy issued by Customs on 12/5/89. Codification not required.

(19 USC 1592) Defines formal investigation regarding prior disclosure.	No	Oppose

ANALYSIS: Customs would approve legislation of definition presently in regulations.

(19 USC 1509) Provide estimated time frames on audits.	No	Oppose

ANALYSIS: Often, time frames are impossible to estimate because of a lack of cooperation by industry in providing records or because of audit complexity.

(19 USC 1509) Requires an initial audit conference prior to the commencement of an audit.	No	SEE ANALYSIS

ANALYSIS: This is the normal practice in the vast majority of audits. However, we would wish to retain the right to initiate an unannounced audit when required.

(19 USC 1509) Allow petition to RC if end date of audit passes without a closing conference.	No	Oppose

ANALYSIS: The Office of Enforcement may open an investigation which may preclude the auditor from holding a closing conference. Otherwise, under normal circumstances, a closing conference is standard practice.

(19 USC 1509) Require completion of audit reports within 90 days of closing.	No	Oppose

ANALYSIS: Since the complexity of an audit varies from case to case, and frequently more than 90 days is required for completion, a statutory period is needlessly restrictive.

(19 USC 1499)
Allow for certification of private labs. No Oppose

ANALYSIS: The provision is unnecessary. The U.S. Customs Service is already accrediting private laboratories under existing authority of the Tariff Act. The procedures are contained in Part 151 of the Customs Regulations. Commercial laboratories who qualify are approved for the analysis of a variety of goods, including petroleum and petroleum products, animal and vegetable oils, and organic compounds in bulk and liquid form. Section 151.13(1) specifically provides for the submission of requests for additional services or commodities. While we have received inquiries from time to time, we have not received any substantive proposals to expand, either from private laboratories or from the importing public.

(19 USC 1499)
Require Customs to accept results from private labs. No Oppose

ANALYSIS: The JIG provision would provide that if the importer chooses to use an accredited laboratory, U.S. Customs would be precluded from conducting its own laboratory test. Such a provision is unacceptable to a regulatory agency charged with the responsibility of administering a myriad of laws concerning revenue, health and safety.

(19 USC 1499)
Require written notice of detention within 5 days after the date of entry. No Oppose

ANALYSIS: This JIG proposal does not take into consideration those instances where other agency licenses, quota, and Section 337 issues need to be resolved prior to release. Requiring a notice of detention in those instances where issues may be resolved in a matter of days is needlessly burdensome. Finally, in most instances the date of entry is the date of release. Thus, the language in the JIG bill is contradictory and nonsensical, since the concept of detention is invalid once release has been effected.

(19 USC 1499) Allow for judicial review of detentions after 30 days following the date of entry.	No	Oppose

ANALYSIS: Since detention proceedings are usually connected with other agency requirements, adding a blanket requirement for Customs to allow judicial review of a detention which another agency is governing, will only complicate the release process. In cases where the current statute/regulation allows for more than 30 days for resolution, introducing CIT review may work against the importer by shortening and restricting the time periods for compliance.

(19 USC 1484(a)(1)(A)) Allow for electronic submission.	Yes	Support
(19 USC 1484(a)(1)(B)) Removes Customs duty assessment responsibility.	No	Oppose
(19 USC 1484(a)(2)(A)) Test triangle processing.	No	Oppose

ANALYSIS: The CMA allows for authority to do triangle processing. We have already tested it.

(19 USC 1484(a)(2)(B)) Removes 10-day filing period without providing authority to Secretary to set time limits.	SEE ANALYSIS	

ANALYSIS: The CMA deletes the 10-day filing period; however, it gives the Secretary the authority to prescribe time periods by regulation.

(19 USC 1484(a)(2)(B)) Provide for either pre-filing of entry or periodic summary filing.	SEE ANALYSIS	

ANALYSIS: The CMA provides the Secretary with the authority to determine the method of filing. As written, the JIG proposal appears to give the filer the option to choose how and when he may file.

(19 USC 1484(a)(2)(C)) Denies right of nominal consignee to make entry.	No	Oppose

ANALYSIS: This is a deliberate attempt to deny couriers the right to make entry.

(19 USC 1484(b)) Omits provision for certified invoice.	Yes	Support

ANALYSIS: In various paragraphs, the continued use of "Customs officer" may limit electronic processing and automation. The CMA has replaced "Customs officer" with "Customs" in those provisions.

(19 USC 1484(c)) Electronic transmissions are binding to the same extent as "paper" documents.	Yes	Support
(19 USC 1484(e)) Removes reference to Customs appraisement responsibility.	No	Oppose
(19 USC 1484(f)) Information transmitted by electronic data interchange satisfies evidentiary legal requirements.	Yes	Support

(19 USC 1484)
Allow for pre-approved release of low risk shipments. SEE ANALYSIS

ANALYSIS: The JIG proposal is unclear as to intended programs. If it is intended to cover line release and selectivity systems, they are covered in general by the CMA and by regulation. Specific legislation is not required. Provision for mandatory examination is not feasible and is contrary to facilitation.

(19 USC 315(a))
Provides effective date of duty rate for transactions received during non-business hours. SEE ANALYSIS

ANALYSIS: The CMA provides for this through Secretary's authority to prescribe by regulation. In JIG's 315(a)(4) the term "stream of merchandise" needs to be clarified before we can determine impact of this proposal.

(19 USC 1505(b))
Importer may deposit duties on a periodic basis. SEE ANALYSIS

ANALYSIS: The CMA provides for periodic payment of estimated duties as the Secretary may prescribe. However, the JIG provision appears to give the importer the right to decide whether or not to make periodic payments.

(19 USC 1505(b))
Customs must prescribe, by regulation, the schedule for payment of duties on a periodic basis within 30 days after statute is enacted. No Oppose

(19 USC 1500(e))
Mailed courtesy notice of liquidation or electronic notice should serve as legal notice. SEE ANALYSIS

ANALYSIS: We oppose the courtesy notice serving as legal notice. The CMA allows for electronic notice serving as legal notice for electronic filers.

(19 USC 1520(c)(1)) Expands clerical error to include results of electronic transmissions.	No	Oppose

ANALYSIS: The expansion in this JIG amendment is too broad. It is in conflict with the CMA proposed frivolous entry provision.

(19 USC 1520(c)(3)) Allows that not citing a binding ruling is a clerical error.	No	Oppose

ANALYSIS: The CMA specifically provides authority to require referencing of ruling numbers.

(19 USC 1592(a)(2)) Clerical errors expanded to include results of electronic transmissions.	No	Oppose

ANALYSIS: See 19 USC 1520(c)(1).

(19 USC 1592(a)(2)(A)) Clerical errors or mistakes of fact shall include not citing a binding ruling.	No	Oppose

ANALYSIS: See 19 USC 1520(c)(3).

(19 USC 1592(a)(2)(B))
Adds that mere repetition of the conduct cited above, resulting from a single initiating factor, is not a pattern of negligent conduct. — No — Oppose

ANALYSIS: The intent here is unclear. In general, Customs opposes codification of levels of culpability under 1592.

(19 USC 1508(a))
Requires centralized record keeping. — No — Oppose

ANALYSIS: As written, the JIG proposal is not optional. If option was intended, it still does not provide Secretary with the authority to regulate. Current regulations provide for centralized record keeping.

(19 USC 1431)
Provides for electronic manifests. — Yes — Support

(19 USC 1440)
Provides for electronic manifest correction. — Yes — Support

ANALYSIS: The CMR has repealed 19 USC 1440 in its entirety. We included and expanded its contents in other provisions.

(19 USC 1481)
Provides for electronic invoices. — Yes — Support

Miscellaneous Proposals
The following proposals do not have statutory references. We are not clear whether these are proposed new sections, recommendations not to be connected with the statute, or other.

Customs must test all National Customs Automation Programs (NCAP) and report to Congress within one year.	No	Oppose

ANALYSIS: As written, NCAP appears to apply to electronic processing for periodic transactions only. NCAP needs to be more clearly defined.

Provide training for field personnel. Provide training for interested trade members.	No	SEE ANALYSIS

ANALYSIS: Customs supports this in principle, but we oppose codifying in statute.

Participation in National Customs Automation Program should be optional.	No	Oppose

ANALYSIS: This NCAP program appears to be electronic processing for periodic entries only. Needs to be more clearly defined.

Provide for uniform, nonintrusive application of regulations and rulings with regard to NCAP. (See previous note.)	No	Oppose

Centralize quota input and processing in one location. Available to all regardless of automation participation.	No	Oppose

ANALYSIS: Customs needs flexibility in determining quota centralization. Proposal is unclear as to meaning of "one location" (i. e., one national, one per district).

(19 USC 1641(a)(2)(B)) Electronic transmission of data is defined as "customs business".	No	Oppose

ANALYSIS: It appears to preclude non-brokers, such as Service Bureaus and Port Authorities, from electronically transmitting data to Customs.

(19 USC 1641(f))
Provides for electronic storage of data by brokers at centralized locations. SEE ANALYSIS

ANALYSIS: Conflicts with the JIG revision of 19 USC 1508 which mandates centralized filing. Also, does not provide for Secretary's authority to regulate. Current regulations allow for centralized record keeping. The CMA includes electronic storage of data.

Chairman GIBBONS. Thank you, Mr. Schulze.

Mr. McGrath.

Mr. MCGRATH. Thank you, Mr. Chairman.

Welcome, Commissioner. I almost broke out into loud applause during your testimony when you said that you were going to work with the trade community regarding some of the Automated Commercial Service computer programs that you have implemented in the Service. I also want to congratulate you for putting Charlie Bortoldus in charge of the Northrop. Is that the reward he gets for good work? [Laughter.]

As you know, I have been particularly concerned about the deficiencies in the ACS as it applies to the large number of complaints that I got from brokers at JFK Airport regarding the lack of information on changes in the ACS.

As you know, most of these changes cause brokers to have to update their systems with added time and expense. As a result of that, the subcommittee recommended that you develop and publish 1-, 2-, and 5-year strategic plans covering all expected changes in the ACS. I am wondering, one, will you be distributing these plans to the ACS users? How will you be distributing them? First, let's get that thought.

Commissioner HALLETT. OK. Thank you.

Well, first of all, I just want to respond to the initial part of your question, because I think in terms of the overall system there were certainly flaws. I don't for a moment think there were not flaws in the whole ACS program the way it went together. However, I think it is also important to point out that we have had enormous successes with ACS, and that is also key. Our future success will lead us not only to a 1- or 2-year plan, but a 5-year plan, as well as a 10-year plan. We have already published one version, and we are continuing to work to update that so that the trade community will, indeed, know what to anticipate.

So this is something that we are going to be working on, and we will also be working on this issue with the ACS Steering Committee. Customs works with brokers through the ABI Steering Committee. We are working directly with the brokers to get their input, and at the same time make them aware of what is going on. And I think, and I would certainly hope, they would be the first to say that ABI has been a very big success, and it has been a success because of working together with them.

I think about 80 percent of our entries are now electronic; I think that speaks to the success story, and we hope to be able to make that an even larger percentage in the near future.

Mr. MCGRATH. Your testimony mentioned that a new Customs trade quarterly would be——

Commissioner HALLETT. Oh, yes.

Mr. MCGRATH. Is this an appropriate vehicle for the publication of these system changes?

Commissioner HALLETT. It will certainly be one of several ways in which to communicate with the trade, Mr. McGrath. The key part of it is that we recognize we must have better ways of communicating, and I think we have done quite a good job with the seminars that we are having on a very regular basis with the trade community, with our personal contact with the trade groups, not

only at headquarters but in the field, and we will continue to devise ways in which to encourage better communication.

[An additional question for the record and Customs response on this subject follow:]

Q. Congressman McGrath: When will your 1, 2 and 5-year plans for ACS implementation be published?

A. Commissioner Ballett: The two-year and five-year plans for ACS implementation will be published in the first issue of the Customs Trade Quarterly. The two-year plan includes items in the one-year schedule.

One should be cautious in using these plans. Customs considers these to be plans for ACS development, but does not consider the contents to necessarily be dated deliverables. Thus, the plans are subject to change for a variety of potential reasons -- i.e., funding considerations.

As projects get scheduled within the one-year scheduling horizon, system users are notified. When information is sufficiently developed for dissemination to system users (i.e. record layouts or changes in decision logic), ACS users are notified well in advance. For even minor changes, users are notified at least 90 days in advance.

Finally, these longer range plans may vary significantly because of, as mentioned above, funding considerations, or competing demands from the trade community, Congress or other agencies.

Attachments: two and five-year ACS implementation plans.

ACS DEVELOPMENT 1990-1991

The ACS work effort during the next two years will conceptrate on making improvements to the current systems that have been requested by the trade, other agencies, and Customs users, to improve our internal controls and audit capabilities, to improve the efficiency and speed of our processing system. We also intend to increase our level of maintenance, required by ACS's increased size and complexity.

These are plans, and like all plans, will change in response to new priorities set by the Customs ADP Steering Committee, trade and other agency user requirements, and statutory and regulatory changes.

A. MODULES PLANNED TO COME ON-LINE IN CALENDAR 1990 & 1991

1990

- Fish & Wildlife & Food & Drug Admin. pilot programs
- Northern Border Cargo Selectivity
- Expand Line Release bar-code processing to airports
- Customs rulings module & diskette subscription service
- Mexican regime module for goods assembled abroad
- Automated late file pilot for fines & penalties
- The ABI application of two-way e-MAIL between the trade and Customs
- Protest Module for filing & querying protests

1991

- Drawback module & drawback claims database
- Add Informal, Temporary Importations Under Bond (TIB), Foreign Trade Zone (FTZ) and Warehouse Entries to the entry processing module, so that filers will not have to do them manually off-line
- Intellectual property rights module for patent & copyright enforcement (initial features)
- Automated interface with surety companies for surety/bond control (initial features)
- Automate data collection and reports for Federal Communications Commission (FCC), Department of Transportation (DOT), & Food Safety Inspection Service (FSIS)
- Federal Records Center module for improved retrieval (initial features)
- Foreign Trade Zone module (initial implementation)
- The AMS application for two-way e-MAIL between the trade and Customs

B. SCHEDULED IMPROVEMENTS TO CURRENT SYSTEMS & CAPABILITIES

1990

- Produce a Bond Liability Report to assess proper limits
- Expand audit trails for add, delete, & change transactions to increase internal controls

- Provide for automated invoice & electronic in-box for import specialists processing
- Improve the ACS Financial System for reconciliation, refunds, billings, & receipts
- Reduce operator intervention in ABI quota processing
- Provide ABI filers with notification of shell record creation and give them bill-of-lading correction capability to speed cargo release
- Make suggested changes to Customs Information Exchange stemming from initial implementation
- Improve the Antidumping/Countervailing Duty (ADD/CVD) module and produce the "Blue-Line Report" for Department of Commerce
- Provide cargo selectivity Criteria Management Reports to improve selectivity targeting
- Expand cargo status messages from manifest for ABI Filers
- Provide for 24-hour quota processing (initial capabilities)
- Provide corrections capability for Census
- Provide an Entry-to-Entry Summary data comparison audit report for improved internal controls
- Provide electronic invoice processing capability for inspectors
- Make U.N. changes to EDIFACT Customs Declaration and Response messages (CUSDEC & CUSRES) for entry, summary and invoice processing

1991

- Begin nationwide implementation of Air Manifest Courier Systems following completion of pilot testing
- Expand Food & Drug Administration (FDA) and Fish & Wildlife (FWS) programs after successful pilots
- Make changes to lockbox processing of Harbor Maintenance Fee to improve internal controls
- Provide lockbox processing of FP&F collections and automate document issuance to improve controls
- Make additions to 24-hour automated quota processing
- Continue expanding selectivity on the N. Border
- Complete conversion of Laboratory System to ACS
- Add house & subhouse bill levels to ocean manifest
- Use unique bill number for Master In-Bond control
- Begin use of the Harmonized Tariff Number in AMS
- Complete the redesign and improvement of the national importer file
- Improve the surety bill payment record process
- Make improvements to ACS Financial System for serially-numbered forms control, liquidation holds & debit voucher processing, and integrate with CAMIS
- Integrate Automated Visa Verification System (AVVS) into ACS (currently stands alone)
- Integrate mail entry & collections into ACS for more internal control (currently stand alone)
- Integrate Agriculture licensing into ACS (currently stands alone)

C. ACS PROJECTS TO IMPROVE SYSTEM PERFORMANCE & SPEED

ACS is working on 13 projects affecting the Automated Broker Interface (ABI); Collections; Cargo & Summary Selectivity; Ocean Manifest; Fines, Penalties, Forfeiture (FP&F) and Seizure Systems; Audit Control; and Management Reports all designed to make processing more efficient, faster, more accurate, and assure improvement in internal controls. These projects may take 12 months to 24 months to complete.

- ABI files are being restructured to permit periodic batch purges rather than continuously running purge routines. This will give us operational flexibility, speed up processing, and prevent gaps from being created in our databases.

- ABI job output routing will be placed under control of the Execution Batch Monitor so that output jobs run continuously, rather than in 3 minute pulses.

- ABI edit and verification processing is being split from ABI cargo selectivity processing to give us the opportunity to schedule urgent transactions from those that can be processed later.

- Streamline Entry Summary Processing so that this most complex ACS program can run smoothly under the current operating environment (CICS).

- Build indexes to the entry, collections, and cargo selectivity files so that end-of-period routines only have to read for candidate entries for processing that period, rather than the whole file.

- Rewrite & enhance the ACS on-line collections program which updates 15 different files and will require modifications to numerous other files and testing routines. This 5 year-old program suffers from slowness resulting from hundreds of changes and accretions over the years.

- Rewrite the Ocean Manifest driver programs to allow simultaneous processing from several steamship lines, and revise edit & update routines to remove major processing bottlenecks and enhance enforcement screening of bills of lading.

- Revise FP&F remote print reports routines placing them in an auto generation mode, rather than on demand -- very disruptive during peak processing hours.

- Redesign the FP&F System and integrate it with TECS II, Seized Property & Seized Currency Tracking Systems to improve internal controls, system compatibility, and speed of processing.

- Provide for on-line archiving of FPA (current series designation) files in the FP&F system to improve processing efficiency and accuracy when stepping into more sophisticated relational databases.

- Disaggregate the report-writing sub-routines in Collections from the master program, so that certain on-line functions will not have to be suspended while these routines are running.

D. CRITICAL MAINTENANCE CHANGES AS SCHEDULED RELEASES

As you can imagine, ACS has developed into a very large and very complex system. More and more of our resources are devoted to maintaining ACS, and testing to make sure required changes do not adversely impact other aspects of system operations.

We have, therefore, grouped the most critical 700 maintenance changes into logical groups and have scheduled their introduction into the system as discrete releases. This improves our maintenance effort, streamlines both programming and testing, and makes maintenance more visible to managers and planners.

This effort involves hundreds of small items, far too numerous to mention. These changes are items discovered in testing, problem reports from our field users and clients, change requests from program managers (some to accommodate tariff changes and Congressional actions), and small suggestions for system improvement from the trade.

ACS DEVELOPMENT 1991-1995

For the next five years, our primary objectives will be to:

- Expand automated commercial processing and enforcement services for the Customs Service, other agencies that interface with or are served by Customs, our private sector trade partners, and other governments that exchange data with Customs, while maintaining the software, hardware, and communications infrastructure that supports the Automated Commercial System.

- Interface electronically with the majority of ocean and air carriers, couriers, port authorities, service centers, and capture data from the remaining non-automated brokers; approach 100 percent of Customs and other agency data capture electronically; improve our employees' computer literacy and increase their use of ACS in the performance of most of their duties for Customs and other agencies; eliminate most of the paperwork backup for the manifest and entry systems in ACS.

We have developed and regularly update a five-year plan for ACS development. This plan changes in response to trade, other agency, and Customs user requirements, including changes required by Congressional actions and regulatory changes. Our latest update projects the following items.

Major Milestones:

Activity	Date
Simplify system security and front-end processing	1991
Expand Automated Clearinghouse funds processing for collections, bills and refunds	1991
Initial automated features for automated drawback	1991
Air manifest enhancements and air courier processing	1991
Temporary importation under bond and foreign trade zone entries via ABI	1991
Further automation & enhancements of the collections/revenue process	1991

Receive and process electronic invoice in EDIFACT & Customs syntaxes	1991
Electronic in-box for import specialist & electronic invoice processing for inspectors	1991
Convert Laboratory System into ACS	1991
Further automation of quota processing	1991
Pilot test Fish & Wildlife Service and the Food & Drug Administration data collection and selective processing	1991
Provide data capture and reporting for other government agencies	1991
Begin national expansion of border selectivity	1991
Enhancements to on-line manifest processing	1991
Design surety company interface	1991
ACS Lockbox for Harbor Maintenance Fee	1991
Fines, Penalties & Forfeiture (FP&F) Lockbox and collections document	1991
Warehouse entries via ABI	1991
Improvements to audit trail programs for add, delete, and change on-line transactions	1991/92
Foreign Trade Zone Module	1992
Integration of Fines, Penalties, & Forfeiture, and Seizure Processing (7 systems)	1992
Expand border selectivity processing system	1992

Ocean manifest enhancements, and multiple threading	1992
Incorporation of house & sub-house bills of lading in the ocean manifest system (AMS)	1992
Expand & enhance air manifest and courier processing	1992
Initial linkages between Customs ACS and other countries for exchange of trade data	1992
Begin design & development of the Automated Commercial Export System for license enforcement and foreign trade statistics	1992
Expansion of Food & Drug Admin. and Fish & Wildlife Service interfaces	1992/93
Add features to other agency interfaces, data collections, and reports	1992/93
Warehouse Inventory Control Module	1993
Expand the border selectivity processing system	1993
Begin programming of Automated Commercial Export System	1993
Initial automation of the General Order System	1993
National Summary Selectivity Phase III -- automated feedback of processing results	1993
Initial implementation of the Automated Commercial Export System (ACES) for Shippers' Export Declaration and outbound manifest data	1994
Further expansion of other agency interface, data collection, and reporting	1994

Continuation of import specialist automated processing enhancements	1994
Initial employment of "expert systems" approach to Customs automated processsing	1995
Expansion of automated visa data capture and verification with exporting countries	1995
Enhancements to research capabilities and flexibility of data analysis	1995
National Summary Selectivity -- automation of history files and criteria update	1995
Continue implementation of Automated Commercial Export System	1995

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

JUL 10 1990

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JUL 12 1990

The Honorable
Raymond J. McGrath
House of Representatives
Washington, D.C. 20515

Dear Congressman McGrath:

This is in response to your correspondence dated June 19, 1990, in which you expressed your disappointment that the 1, 2 and 5-year plans for ACS were not published in the Customs Trade Quarterly.

The theme for this inaugural issue of the Customs Service's new publication was Commissioner Hallett's outreach initiative and Customs programs for better communication and cooperation between Customs and the trade community. We wanted to provide an overview of the many new programs, rather than focus on any one area.

Please be assured that future issues of the Trade Quarterly will encompass information concerning Customs automation plans, as well as changes and enhancements to the Automated Commercial Systems (ACS) and other Customs programs.

We appreciate your interest and suggestions concerning both the Customs Service and our new publication. We trust you will find that future editions meet the informational needs of all our readers.

Sincerely,

Samuel H. Banks
Assistant Commissioner
Office of Commercial Operations

Mr. McGrath. The subcommittee recommended that Customs study new cargo examination technologies and make more use of x ray equipment instead of the chain saw approach. I understand that the Customs' total annual R&D budget is only $1.6 million, and of that only $500,000 is being spent on cargo examination R&D.

A few years back, during the consideration of the drug bill, I offered an amendment that was accepted, authorizing up to $15 million of existing funds for research into detecting narcotics in cargo containers. I am a little chagrined that more effort and energy has not been used or not devoted to these resources in this important area, and I would like to know why Customs hasn't been more aggressive in seeking support for developing these kinds of technologies.

Commissioner Hallett. Well, I would first of all point out that I think much of our effort is being directed in that area now. We have certainly stepped up the use of x ray machines. In fact, rarely is there a cargo facility that I visit that does not have one of the small x ray machines. We are talking with others about the large x ray machine, which, of course, is a $30-million-plus item for each item. It has great potential, but it also obviously is limited from that cost standpoint.

Now, in addition to that, we have some 64 new technologies that are being worked on. We have gotten some additional research and development tools from the military, from DOD. So I think you combine all of this, and we are trying to come up with new and aggressive ways to do a better job in this area. Having said that, the funds you speak of, though authorized, were expended for other pressing operational needs. Additional funds specifically for research and development were not appropriated.

Mr. McGrath. Are you aware that the vendors of some of these technologies are approaching various ports and carriers to begin pilot projects using this technology?

Commissioner Hallett. Yes. And, in fact, I have actually seen a demonstration of one of them in Houston.

Mr. McGrath. Under the 1988 authority, Customs was to have published a report on the usefulness of new technologies in conjunction with the 1990 President's budget. Was this report ever issued?

Commissioner Hallett. I would like to be able to get back to you on that because I do not know.

Mr. McGrath. Thank you. Thank you for your testimony. It was very enlightening.

[The following was subsequently received:]

REPORT FROM THE COMMISSIONER OF CUSTOMS ON THE STATUS OF DEVELOPMENT OF TECHNOLOGY FOR THE DETECTION OF DRUGS IN CARGO CONTAINERS

According to the Anti-Drug Abuse Act of 1988 (PL 100-690), Section 7368, funds in the amount of $4.1 million were authorized for appropriation to the U.S. Customs Service on October 21, 1988, to be used only for accelerating the development and availability of X-ray detection, nitrate detection or other technologies to be utilized for the detection of illegal narcotics in cargo containers entering the United States at seaports, airports, and land borders. Further, the Commissioner of Customs was requested to report his findings from the container drug detection R&D to be undertaken, to the appropriate Committees of Congress.

In the Fall of 1988, as a consequence of the Act cited above, the Drug Science and Technology (S&T) Committee and the U.S. Customs Service identified their number one priority for technology development - the detection of drugs in large cargo containers, 20' and 40' lengths (8' width and height). Based on the expectation that funding would be available from the Omnibus Drug Bill of 1988, the Contraband Working Group of the S&T Committee, led by the U.S. Customs Research and Development Division, undertook the solicitation of the private/ university community for new and innovative technologies to help solve this difficult problem.

As a consequence of the solicitation, sixty-four proposals were received in August 1989 and were evaluated by an interagency evaluation team of experts in drug/explosives detection. Many of the proposals represented innovative thought and effort. Unfortunately, the funds which were authorized for appropriation in the Anti-Drug Abuse Act of 1988 were never appropriated. However, Customs and the S&T Committee of the Office of National Drug Control Policy continue to search for funds to make awards to the highest ranked technical proposals from the solicitation.

Despite the lack of funding from the Drug Abuse Act, Customs, with its existing R&D budget for contraband detection R&D (less than $1 million annually for the past several years), has developed and continues to develop technology that is proving useful or shows promise for finding drugs in cargo containers. This equipment is discussed briefly below:

o Mobile X-ray Systems: Customs R&D Division developed technical specifications for a competitive procurement for mobile X-ray equipment designed for customs-type examinations at airports and seaports. Fifteen systems have now been fielded nationwide, with eight more to be delivered in the next several months. These systems have been credited with scores of drug, weapons and currency seizures in the months they have been in operation. The systems are used to examine cargo off-loaded from containers, other breakbulk cargo and baggage of dimension not greater than 32" wide by 40" high, the size of the entry portal to the X-ray chamber.

o Laser Range Finders: Customs recently has developed laser-based technology to find false compartments in filled or partially-filled cargo containers. The narrow beam characteristic of the device (1" diameter at 60') allows longitudinal measurement of the container either above cargo, through openings between cargo and even beneath cargo pallets. If, when comparing this interior measurement to an exterior measurement of the container, a substantially lesser distance is obtained, a false wall could be inferred. Customs also continues to use wide beam ultrasonic range finders to measure interior dimensions of empty cargo containers in search of false compartments.

o Hand-held Density Gauges: Gamma ray backscatter technology has been developed for use by Customs inspectors in finding anomalous densities in cargo container walls, automobile tires, car doors, vehicle rocker panels and other locations where contraband can be concealed. These hand-held devices use a small radioactive source to interrogate homogeneous surfaces in search of unexpected densities beneath the surface. Customs has several of these units in use primarily along the Southwest Border and numerous drug seizures have been reported from their use. An improved lower radiation source version of the device is nearing completion and, if successful, will allow Customs to use this technology without the necessity to obtain a license for radioactive materials from the Nuclear Regulatory Commission.

o Biological Antibodies for Drug Detection: Customs is sponsoring the Naval Research Laboratories in the development of biological antibodies for the detection of cocaine and heroin. This developmental effort could lead to a very sensitive detection device that would be specific for cocaine or heroin. Such a technology, when combined with an efficient preconcentrator/collector, may have application to the sampling of air from cargo containers and other concealments in search of drug vapors.

To date, no technology based on vapor detection to find drugs has successfully met operational requirements. However, Customs feels that this biological approach holds much promise due to its great sensitivity and specificity. Much like the human body develops antibodies to invading organisms, test animals similarly are caused to develop antibodies to concentrates of specific drugs; in this case cocaine and heroin. The antibodies developed in this manner are extracted from the blood of the test animals and form the basis for a detector that is specific for the drug of interest.

o Development of Preconcentrators for Drug Vapor Detection Techniques: Available vapor detection technologies which purport to be able to detect heroin and cocaine vapors, in reality require particles of these drugs for detectability. In cargo containers such particles are rarely available due to precautions taken by smugglers in packaging and placement of the drug contraband.

It is believed by Customs technical personnel that vapor detection may offer, ultimately, the one best hope for drug detection in cargo containers. However, due to the low vapor pressures of drugs, it is also the the position of Customs that vapor detection technologies, chemical or biological, can succeed only if techniques for collecting and concentrating the desired vapors from large quantities of air can be developed. Toward that end, Customs has awarded contracts in pursuit of two approaches aimed at developing improved pre-concentration techniques. If successful, these approaches could be applied to any of several vapor detection systems currently on the market.

NOTE: The report mandated by the Omnibus Drug Bill of 1988 was never submitted to Congress. The reason for this is that Customs interpreted the requirement as being predicated on funding that was authorized, but never appropriated. Nevertheless, Customs has developed technologies which have proved successful in the examination of cargo (as described above).

Chairman GIBBONS. Thank you, Mr. McGrath.

Mr. Anthony.

Mr. ANTHONY. Thank you, Chairman Gibbons.

Welcome, Commissioner Hallett. In your testimony on page 3, you talk about regular contact with major trade groups on an ad-hoc basis and through quarterly meetings. And you just mentioned the seminars and all the stepped-up activity of Customs to get them input. I am just curious. What are some of the main issues that have recently come out of those meetings?

Commissioner HALLETT. Well, among other things, the meetings to a great extent have been designed to talk about specific issues. One recently with AAEI addressed drawback. With the National Brokers Association, we have discussed not only software issues but the whole automated ocean manifest system. And in each instance, we are getting feedback from them on specific areas of concern. Certainly, the suitability of ACS, is one of the areas the trade has talked about, and we are trying to respond to their concerns, particularly with respect to reviewing our progress, and thinking of where we need to go from here, and on what timetable.

Mr. ANTHONY. Do you have the same people, the same personnel at each Customs meeting with the trade groups or is each meeting assigned to different personnel within your organization?

Commissioner HALLETT. Well, of course, it depends on the issue.

Mr. ANTHONY. So if you have different issues, you have different personnel.

Commissioner HALLETT. That is correct. We also try to involve the regions as well, so that issues at headquarters permeate down to the regional level.

For instance, we have had conferences in Los Angeles and Houston which included not only people from headquarters but also those in the Houston area from the Southwest region.

Mr. ANTHONY. What I am driving at is one of the recommendations contained in the report for the establishment of an ombudsman position within Customs. Would you be opposed to that?

Commissioner HALLETT. Not at all.

Mr. ANTHONY. So that is not one of the recommendations you disagree with, as stated in the first part of your testimony. Is there any disagreement——

Commissioner HALLETT. We are already doing that.

Mr. ANTHONY. You are implementing this recommendation?

Commissioner HALLETT. Yes.

Mr. ANTHONY. Has it already been implemented?

Commissioner HALLETT. Yes. It is in the process of being implemented right at this time.

Mr. ANTHONY. Wonderful. Has it actually been implemented?

Commissioner HALLETT. In fact, the man is already on board, and he is a businessman from Texas.

Mr. ANTHONY. His name?

Commissioner HALLETT. Kent Foster. He came on board about 3 weeks ago. He has already visited I think six States.

Mr. ANTHONY. That is wonderful.

Commissioner HALLETT. Visiting with brokers, visiting with others. We are really very much on track on this. In fact, the deci-

sion to establish an ombudsman position was made before the report had even been issued by the committee.

Mr. ANTHONY. That is good. The reason I personally think it is good is because if one person deals with all of the problems collectively, then you avoid the case where one person in the agency hears of a problem and somebody else does not and then it does not get reported, or adequately reported back to you. Hopefully, this will improve some inefficiencies in reporting back to you for corrective actions.

Commissioner HALLETT. If I might just point out, this particular individual, reports directly to me, and we are talking on an at least a once-a-day basis. He is working very closely with our new Assistant Commissioner for Commercial Operations and has really, I think, hit the ground running in terms of getting out and starting to meet with the trade community.

Now, that doesn't mean that he has met with all of them. He has not because there has not been time. In fact, one of those 3 weeks he was involved in in-house meetings for the entire week.

Mr. ANTHONY. That is good. As you well know and the record establishes, from 1980 through 1987 your processing and inspection of cargo has more than doubled, while the number of your officials rose only slightly. Your own testimony states that you think it may double again in the next decade.

I would like your assessment of the performance of ACS in fulfilling the dual role of expediting the movement of goods through Customs facilities and for enforcing the antismuggling laws. Also, I would like to have your assessment of whether you should have further automation and if it warrants a drastic reduction in the funding level for staffing commercial operations. Or do you feel that there should be a funding floor for commercial operations?

Commissioner HALLETT. Well, I would like to start out first of all by saying that I think without ACS we would have had a disaster on our hands. We simply would not have been able to keep up with the enormous workload increases. And, in fact, a recent study that was completed by the Treasury Department states that some 6,500 new jobs would have been necessary had it not been for the actual work of our ACS system. So I think that is a very positive step in the right direction.

That, however, is not to say that we don't need to continue to have a strong work force because that will be a key to our ability to deal with this increased workload. The ability to facilitate enforcement is going to be very important, and I think ACS will help there.

Clearly, we need to go paperless, and I think we have made a great leap forward in the last few years in having a paperless entry, and that will help us. Certainly, talking in our modernization act deals with a variation of national entry processing. Some people in the trade community think it is great; others think it is terrible. That is why I say some variation, because we want to try to work out our differences with the trade community—recognizing that we can't make everyone, including the Customs Service, happy.

But these are areas that will help us meet this great increase in demand.

Mr. ANTHONY. What about a floor? What is your position on a floor?

Commissioner HALLETT. Well, if we have a floor, and if we can reach the floor, then we are going to be able to meet our needs. But many times a false floor is established, and we are not able to reach that floor.

Mr. ANTHONY. Mr. Chairman, my time has expired. With your permission, I would like to submit some additional questions to Commissioner Hallett.

Chairman GIBBONS. Without objection.

Mr. ANTHONY. Thank you, Commissioner.

[No questions were submitted.]

Chairman GIBBONS. Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

Welcome, Commissioner Hallett. I have just a couple of questions. I note that the Joint Industry Group's proposal which Mr. Frenzel and I introduced yesterday recommends testing of the various automation systems before full implementation. And the brokers favor even more delay in that system.

What is your view or what does Customs propose in terms of timing on your automation efforts?

Commissioner HALLETT. Well, Mr. Congressman, first of all, we are also looking at the testing, and, in fact, we do test all the time. I think that as we continue this process, we are going to find that particularly with anything new coming in under ACS, testing will be important. Also important is the creation of a new Assistant Commissioner position, the Assistant Commissioner for Information Management. All ACS has been moved under the jurisdiction of this AC. We believe that it will not only provide for much better coordination, but improved and adequate testing which will come under that new offices jurisdiction. Hopefully then, this new office will resolve some of these problems that have existed in the past.

If nothing else, it is going to provide for predictability and reliability in the system which the trade community desires, and I think that I would agree with the trade.

Mr. PEASE. Thank you.

The Oversight Subcommittee's report recommends the creation of an ombudsman position at Customs. What is your position on this suggestion? Do you think it will help overcome some of the problems that the subcommittee report identified?

Commissioner HALLETT. Well, as I was commenting on previously, we now have the ombudsman on board working conscientiously to really carry out what I think is a very key role in terms of being a listener. This individual is someone who has good business experience, and he comes to this position without prejudice or any opinion as to which side is right and which side is wrong. His No. 1 responsibility is to listen and report back to me.

Mr. PEASE. How is that working out so far?

Commissioner HALLETT. Well, he has only been on board for 3 weeks, and out of those 3 weeks, 1 he was in-house learning. He is still learning. I am still learning. But I can tell that with the visits that he has made around the country so far, this position is becoming a very important position to us.

Mr. PEASE. Thank you very much.

Commissioner HALLETT. Thank you.

Chairman GIBBONS. Thank you, sir.

Mr. Frenzel.

Mr. FRENZEL. Thank you, Mr. Chairman.

Thank you, Commissioner, for your testimony. We wish you well as you settle into what is one of the most difficult jobs in Government. I think from the Pickle-Schulze report and from other criticisms, you have an idea that we have a lot of ground to gain jointly.

I suppose, of the criticisms of the Pickle-Schulze report, the one that seems to me to be the most important is the first one, which talks about your relationship with the people you work with. There has been a feeling, or at least outsiders have gotten the perception, that the Customs Service has felt as though the people it worked with—the importers, exporters, brokers, and so on—are some sort of adversaries. It is good to know that you see efforts conducted with those people as being cooperative efforts. I hope that you will continue to try to instill that in your group because there is still, at least to this observer, some sort of adversarial feeling. What we have is a joint task that we have to do together, and if we cooperate, we will get it done more quickly, more cheaply, and carry out whatever laws are needed to be carried out.

I have a couple of specific questions. One relates to the rulings that are being made under an obscure section of the law called "same condition drawback." Here there is a question of substitution, what items can be substituted for others. I guess the central question has been the description of what is fungible and what is not.

Your people have been issuing or making rulings that seem to me to be very unusual, in which you are claiming the products to be nonfungible on I think the flimsiest of distinctions; that is, you are making distinctions where there is no difference between the products. It has been a matter of some sensitivity to me because Customs Service people are saying they are trying to carry out the intention of the author of the law. And as that person, it was not my intention that these distinctions should be overly restrictive.

I hate to do a show and tell, but I have a little demonstration here. Those are two cans of peaches, canned to the very same specifications, one in this country and one outside of it. One of them bears a little tiny "K" on it, and that would tell a consumer that was following the dietary laws of the Jewish religion that that was kosher, and that product's packing or whatever they do has been observed and blessed by the rabbi. But when it came time to export the product, your people decided they were different products. The manufacturer didn't think they were different and wanted to sell them to the same kind of people.

I don't mean to overdo this, but that is an example of what your folks have been doing. You pack a product like this in a heavy syrup or a light syrup, and you have decided that that isn't the same condition. That was not the intent of the law, Madam Commissioner, and I would really like to have you take a look at some of the rulings that your Service has made. And perhaps you and I or some of your associates might sit down and discuss the basis for

that kind of ruling against what seems to me to be the way the law was written and the basis for the law.

I don't expect you to respond to this immediately, except I would like to ask you if we might get together on it later on.

[The following was subsequently received:]

Q. Congressman Frenzel:

Information on the duty drawback program (i.e., peaches example).

A. Commissioner Hallett:

The statute (19 U.S.C. 1313 (j) (2)) allows substitution only if the substitute merchandise is fungible with the imported merchandise. In congressional comments on the bill (Hearings before the Subcommittee on Trade of the Committee on Ways and Means on Miscellaneous Tariff and Trade Bills, 98th Cong., 255) (November 15, 1983, and June 1, 1984) it was stated that the important consideration was that only commercially identical merchandise could be substituted. On November 4, 1983, it was further stated that the language of the bill had been changed from allowing a substitution on the basis of "same kind and quality" to the narrower basis of "fungibility" because Customs had pointed out that the former was too broad. Congressional Record, page E5339, November 4, 1983. It was stated there was no intent to allow companies to obtain substitution drawback on items that would not be commercially identical. The report on H.R. 4316, the predecessor to the bill that was enacted, states that the purpose was to provide for the substitution of merchandise of a commercially identical nature. H. Rpt. WMCP 98-34, 98th Cong., 67 (1984); H. Rpt. 98-1015, 98th Cong. 64 (1984); and Conference Report H. Rpt. 98-1156; 125 (1984).

The grades for agricultural products, such as peaches, that are set in the U.S. Department of Agriculture standards are used by the industry to establish commercial identity. We have been advised by that Department that those standards are largely codified industry standards. In the specific facts one group of peaches was labeled "choice"; the other group was standard. The two groups were in separate grades; that is one group could be grade A group and the other could be grade B. Because the industry differentiates among the different packing mediums, Customs follows that differentiation. Likewise, the Acting Chief, Drawback Branch, New York Region, who requested our advice, brought the significance of the kosher labelling to our attention. She informed us that kosher foods are more costly to produce because the manufacturer is required to clean the equipment extensively and otherwise operate in compliance with the jewish dietary laws. If commercially identical is to have any meaning, it must mean that any purchaser would be willing to accept either article of merchandise. While it is true that a person who did not follow the kosher laws would buy kosher or non-kosher foods interchangeably, it is not true that a person who complied with those laws would buy non-kosher food as an acceptable substitute.

Commissioner HALLETT. Certainly. Mr. Frenzel, I might mention that I think that specific drawback issue is currently in litigation, and so I don't want to get into the specifics of that one. But at the same time, I would look forward to the opportunity to take a look at the general area. With respect to drawback as an issue, we have a provision in our modernization act legislation that is being reviewed by Treasury. At the same time, we have discussed it with a number of people in the trade community. We have heard many complaints. As a result, we are going to look at the overall program, and certainly we will look at the potential for new legislation as well as reviewing the old legislation. So I would look forward to the opportunity to discussing it with you further. Certainly, I will be discussing it at length with the trade community as well.

Mr. FRENZEL. Well, that would be very helpful, because if there is something in the law that is causing you to make goofy decisions, we certainly want to correct that. On the other hand, if there is something in your institution that is causing you to make goofy decisions, we would also like to help correct that.

I have some other thoughts that relate the same way. In the bill that Mr. Pease described earlier, we are also trying to make some corrections. Right now I am told that if people are audited by Customs, to find out what happened in that audit they have to make requests under the Freedom of Information Act. You know, this is America not some place else. It seems to me that that is kind of silly, and that we should be exchanging information with one another about these kinds of audits.

We have other disclosure problems. All of these things seem to get back to the original problem noted by the Pickle subcommittee, and they seem to be attitudinal. I can understand that you haven't had a chance yet to impress the whole Service with your style of management, but I hope we don't—I really hope we can get away from this business of a bad attitude and an attitude that you are against the rest of the world and you have to beat them up to make them conform to your standards.

I think this committee, as well as the Pickle committee, is watching your efforts with great care and are anxious to help you as we try to proceed cooperatively toward the accomplishment of the Service's mission.

Commissioner HALLETT. I appreciate that, Congressman Frenzel, and I might point out that I have always prided myself on being a consensus builder. I think that in that way we can accomplish much more than a different type of style when we have so much that needs to be done with others.

I would certainly like to point out that one of the interesting surprises I had about 1½ months ago was to find out that we on the third floor—which is the administrative floor of the Customs Service—were putting together a new reorganization plan. In talking to people on the first floor of headquarters, they didn't know anything about it. And so I realized that we had a much bigger problem than I had anticipated. And if the people in headquarters are not aware of what is going on, how can the people in the field know what is going on?

So we are doing a number of things to try and change that, including more discussions. I am aggressively going out into the field, but I have also initiated something else. I have already distributed the first of what will be a monthly video report to the field. This is a 15- to 20-minute report, not only touching on the high points of what we are doing under my leadership, but taking time for at least 5 minutes to respond to questions that come in from the field. In addition to that, I will also be following up by having a quarterly open house with employees here in Washington so that they can be brought up to date on what is going on and have an opportunity to ask questions.

These are examples of how I have attempted to enhance communications. If you don't tell your own people what you want to do in terms of your management style, then you can never succeed.

Mr. FRENZEL. Well, I am encouraged by your efforts. Your agency has about three times as much to do as it has resources to do them. It is awfully easy to get impatient, to be snappish with people with whom you deal, and we are going to do everything we can to make your job easier. We appreciate what you are doing——

Commissioner HALLETT. Thank you.

Mr. FRENZEL [continuing]. And what all of your associates in the agency are doing. Thank you.

Chairman GIBBONS. Mr. Rangel.

Mr. RANGEL. Let me adopt the compliments extended by my colleague and Bill Frenzel so that it won't come out of my time, and ask you whether or not it is true that it appears as though the administration is deemphasizing the importance of interdiction of drugs. I am just wondering whether you have any idea how much of the drugs entering the United States is coming through cargo containers, and what percentage of those containers are you able to inspect?

Commissioner HALLETT. Congressman Rangel, first of all, I would like to point out that there is in no way an effort to deemphasize our important role in enforcement. Interdiction continues to be a very key part of the overall Customs responsibility.

At the same time, I have indicated that I am going to work very hard to balance enforcement and commercial operations, and by that I mean that I must raise the level of focus as well as the attention that we give to commercial operations, and I am aggressively working to do that.

However, I think that—and before I respond to how much cargo we actually inspect, I would like to say that I think we have had some rather significant successes already this year, because it took 17 years and approximately 3 months—and the 3 months were on my clock—to work with DEA to develop a Title XXI cross-designation authority so that we in the next 18 months will be able to cross-designate 1,000 of our agents to do not only drug money laundering but also drug smuggling investigations—which was not possible until we were able to achieve the landmark agreement with DEA. I do not recall the exact amount, however I believe that the Customs Service has seized 90,000 pounds of cocaine, approximately 900 pounds of heroin, and record amounts of hash since the beginning of the fiscal year. And I think that if this rate continues it is obvious we are not in any way diminishing the job that we are at-

tempting to do. In fact, I am working aggressively to try and develop new ties with other countries around the world so that we will be able to provide training assistance to help in stopping drugs from coming into their countries, as well as finding ways to better identify those individuals who are transiting other countries when bringing drugs to the United States.

With respect to the cargo amount, we are currently inspecting about 20 percent of the containers from high-risk countries. About 8 million containers overall that will come in, and that 20 percent of those containers is the number that we are inspecting from the high-risk countries. I would say from the low-risk countries it could be down between 3 and 5 percent.

Mr. RANGEL. Are you able to determine whether or not cargo from high-risk countries have gone to a low-risk country before entering the United States?

Commissioner HALLETT. I think that there is definitely that possibility. I was in Mexico City last Thursday and Friday and had an opportunity to speak with the head of the police department for the airport, at Mexico City airport. We discussed that specific issue of whether or not containers are going first to Mexico City and then on to Miami, or whether or not other cargo is going from, let's say, Bogota to Miami in bond, then to Mexico City. However, even if that happens, we are still giving the same amount of scrutiny by way of the recordkeeping system that we have that determines where the cargo originated, even if it goes from high risk to low risk back to another city.

Mr. RANGEL. There seems to be a great emphasis on cooperation between nations in trying to stem the international trafficking of drugs. There was the United Nations Convention as well as one recently called by Prime Minister Thatcher. Customs is participating in these conventions. I am glad to see that.

Do you know whether Bill Bennett is working with these other countries and, therefore, working with you in developing this strategy?

Commissioner HALLETT. Absolutely. We are working very closely with not only the drug czar's operation, but in addition to that they communicate to us the work that they are doing with other countries. A good example would be a recent study that has been conducted in Spain just with respect to this whole cargo issue. We have all been brought into that picture.

So I think we all agree in this area that to single any one country out and say that is the only country that needs to do the job, we will all lose, and I think we all recognize that.

Mr. RANGEL. Thank you, and good luck, Commissioner.

Chairman GIBBONS. Mr. Guarini.

Mr. GUARINI. Thank you.

I want to congratulate you, Commissioner, for your vision of the Customs Service and wish you success in the implementation of all those new ideas.

When Congressman Rangel asked you about the percentage of cargo entering, you mentioned high-risk countries and low-risk countries. But once you get automatic cargo system implemented, what would you imagine those figures would be then? Would you be able to inspect more coming in from the drug areas, from either

the high- or low-risk countries? Would this give you facility to be able to have a much higher success rate at inspection?

Commissioner HALLETT. Mr. Guarini, I really believe that based on the considerable increase in cargo that we anticipate will come into the United States, and not seeing an increase in staff to match that, certainly ACS is going to help us better identify those cargo containers that need to be inspected. But without new tools, such as new x ray equipment and other kinds of tools, I cannot make a commitment to you today, except that we will continue to enhance our efforts.

However, I think that we will see tools that will help us do that, and probably one of them is one of the best manpower resources that we have come across in the last several years; that is, the addition of the National Guard helping us to inspect, not only at our ports but at the CES facilities. I would just like to take a moment to give a big plug to the National Guard and what they have done. We could not today seize or inspect what we are doing were it not for their assistance.

I think in addition to that, we certainly are on the right track in terms of the job that we have ahead of us, not only with ACS but OCS, our tech system for following all of this information, and certainly the port tracking system that has been developed. It is going to help us. But to say how many more we can inspect, I am sorry, I cannot tell you.

Mr. GUARINI. Well, all these inspection systems, are they basically being implemented——

Commissioner HALLETT. Oh, yes, they are.

Mr. GUARINI [continuing]. For cost saving, or are they being implemented because you are going to be able to check more cargo? In other words, what is the purpose of these systems? Is it to be able to examine more cargo? Do you expect that you are going to be able to come back and give us a higher than 3 to 5 percent inspection rate the next time you testify? Or are we so overwhelmed by the additional amount of cargo that is coming in that we will continue to fall behind even though we do have new systems in place?

Commissioner HALLETT. Well, as I mentioned, in the cargo coming from the high-risk countries, we are inspecting 20 percent of that cargo. In cargo from low-risk countries——

Mr. GUARINI. But they are more the smaller countries, though. The big volume of cargo probably comes in from low-risk countries.

Commissioner HALLETT. I would say if you take a look at Long Beach, Los Angeles, and consider that that is 2 to 1 the largest number of cargo coming into any port in the country, we have many high-risk countries that are sending cargo to that particular port area. And because of our targeting and our selectivity, which are key in this area, I don't think that we are going to be examining many more cargo shipments than we are right now.

Mr. GUARINI. So it is basically a cost-saving device; it is not more inspection.

Commissioner HALLETT. It is a combination of the two. I guess what I am saying is the number of cargo movements come in, we will be able to keep up with it.

Mr. GUARINI. All right. Let me turn in the little time I have left to preclearance. You were the Ambassador to the Bahamas, and you had a lot of experience there in preclearance, where Immigration and Customs was able to work together. Should this be the wave of the future? Are you very bullish on our being able to save money, at the same time facilitate the movement of passengers through our borders by having preclearance? Should we do more in this direction?

Commissioner HALLETT. Congressman, let me start out by saying that I am personally very supportive of preclearance. I think that when you have the right support from the country in which you have preclearance, it is extremely successful. At the same time, I know that under the Ways and Means version of Customs fiscal year 1991 authorization, a preclearance study has been mandated. I would like to ask that we go forward with that study and then come back and try and make a determination. And the reason I say that is because there are several problems.

First of all, it costs approximately $100,000 per employee to put them in a foreign country.

Mr. GUARINI. But you often use local people. You don't have to have——

Commissioner HALLETT. No, no. Not for any inspectors. The only foreign nationals we use would be for secretarial or clerk work, but none of them can be authorized to do the inspection work as an inspector.

So that is a problem. Security is a problem. I think the key—and I would hope in the study we would be able to review this—is the absolute need to make sure that we have equal status under the law of that country. The whole issue of immunity and privileges is something that we are looking at right now with Canada, because we have, very frankly, a very dismal situation up there, particularly with the facilities.

So when we take a look at all of this in the study, I think we will be able to come back with some recommendations. I guess my only other caveat at this time would be that I would hope that if we were going through with new preclearance facilities, we would start with low-risk countries because I think that would enable us to do a better job.

Mr. GUARINI. Thank you, and good luck.

Commissioner HALLETT. Thank you.

Chairman GIBBONS. Mr. Chandler.

Mr. CHANDLER. Thank you, Mr. Chairman.

I would like to begin by apologizing that I had to be out of the room, and I missed much of the testimony. But, Commissioner Hallett, I would also like to say that I appreciate very much your availability and your responsiveness to concerns, especially in Washington State, that we have raised.

As you know, it has been a major concern of ours, especially in the State of Washington, probably Oregon as well, that the level of examination of cargo, especially from the Orient, not exceed in level that which would occur in other competitive ports. This all has to do with the threat assessment.

Now, if you have already answered questions on this, there is no point in going over that again. I again apologize for having been out of the room. Has this subject been discussed?

Commissioner HALLETT. Yes, it has, Congressman Chandler, and I very briefly would say that it is a problem. We are looking at it, and we will be getting more information back to you on that.

Mr. CHANDLER. All right. After examining the record, if there is more to discuss, I can always do that by writing.

[The following information was subsequently received:]

Question. What plans does Customs have for implementing the "threat assessment" requirement contained in HR 4328?

Answer. Customs continually takes steps to ensure uniformity of exams from port to port. At present, no concrete plans for a nationwide "threat assessment" have been drawn up. Rather, the notion of this "assessment" is being discussed. Some background and reasoning appear below.

Historically, threat assessments have been based on past activities. They can sometimes, though not always, provide management with a general overview of what could happen in the future. Very often, they are most useful when done at the local level.

In the universe of threat assessments, there will always be a variation of exam rates from port to port for a variety of reasons—staffing levels, volumes of cargo, differences of narcotics or commercial violations in different ports, etc. Thus, to consolidate an analysis of violations of the 400 plus laws which Customs administers and enforces, for purposes of a national assessment, could deemphasize activities or threats in given areas which are in need of special attention. What might be good from a national perspective might not necessarily be good for an individual port, and vice versa.

The Customs Service understands and agrees with the intention of the recommendation for a threat assessment contained in the Pickle Report, and believes in uniform policies and procedures. Nevertheless, Customs feels strongly that we would prefer to work with the committee on the "threat assessment" requirement before going forward with any plan to implement the requirement.

Mr. CHANDLER. In terms of the damaged cargo issue, we have gotten some laughs on the committee as I distributed photographs of a shipment of materials that were sent to me by an antique importer. It was laughable because if they were antiques, they were obviously just completely destroyed by the inspection process. Did you have a chance, or did other members question you about this issue as well?

Commissioner HALLETT. We did, Congressman. But I would just like to ask one question. How recently did that occur?

Mr. CHANDLER. If I can get my staff to bring me that letter——

Commissioner HALLETT. While that is coming forward, I would just like to make a comment; that it is certainly of great concern to us.

Mr. CHANDLER. The letter is dated March 5, and the shipment was October 1989. Did I have a chance to show you the pictures?

Commissioner HALLETT. Yes, you did.

Mr. CHANDLER. Yes, I think you have seen them. But the obvious concern is elimination of the damage like that, and when it does occur—which I think is probably inevitable—the question of compensation.

Commissioner HALLETT. We have addressed the question of compensation, and among other things, I know that there is a difference from agency to agency how this is done. I mentioned that right now there is a statutory limit of $1,000, which we pay. I personally am very sympathetic in this area, but at the same time, if

money were not appropriated to us to pay these damages, it would come out of the hide of the Customs Service, and that is troublesome to me as well. So we are between a rock and a hard place, so to speak, on this one unless there is some kind of a legislative change. But I am particularly concerned that we be made aware also when this kind of damage occurs so that we can follow up on it.

Mr. CHANDLER. Do you feel, since you have been in your position, that the use of x ray and other techniques has reduced the amount of damage while not compromising the examination process?

Commissioner HALLETT. Unfortunately, I don't think that we could say that the x ray equipment has done that because the x ray equipment does not check large pieces. It is the smaller pieces, the smaller boxes like this. A large shipment of furniture might not be small enough to put through the current x ray equipment, and that, frankly, is one of the reasons why I am hopeful that sooner or later larger x ray equipment will be developed that we can afford so that it will help us to do a better job on this. But right now we only have 12 x ray vans in the country. We have a desire to obtain more, and as we do, that, too, will help.

Mr. CHANDLER. I don't know if my colleagues are aware of it. The Commissioner is an accomplished private pilot and a highly experienced one. Because of your interest in aviation, I wonder, has there been work to minimize the problems of inspection of aircraft and damage done to aircraft in that process, especially in the Southeastern and Southwestern United States area, by Customs?

Commissioner HALLETT. I will be very honest with you, Congressman. I am not aware of a significant amount of damage to aircraft in the Southeast or, in fact, in any part of the country, although there are certainly inspections that we carry out where we can with the FAA to determine whether or not there are illegal modifications. But in terms of the actual overall disabling of aircraft, I am really not aware of that.

Mr. CHANDLER. I think that was an issue a year or two years ago. Perhaps there have been corrections.

Commissioner HALLETT. With the zero tolerance program?

Mr. CHANDLER. Well, this is more the mom-and-pop private pilot landing after being in the Bahamas or some place.

Commissioner HALLETT. Can I look into that for you? Because I know that we use airplane mechanics when we do our investigations, and unless there is a hidden compartment that we are looking at—and, you know, there certainly have been problems with boats and vessels having significant changes made to them because of inspections. But I am not aware of the aircraft issue. I would like to get back to you on that.

Mr. CHANDLER. All right. I think that would be good. I haven't heard complaints for a while, but the complaint was that panels were removed and things were done which rendered the aircraft unusable, and it was up to the owner to replace with an authorized mechanic whatever had been done, and it was expensive.

Commissioner HALLETT. Right. That is correct.

Mr. CHANDLER. I thank the Commissioner and the chairman.

Commissioner HALLETT. Thank you.

[The following was subsequently received:]

Q. Congressman Chandler:

Updated information on searches of private aircraft (e.g., include a summary of reported damages to private aircraft over past 2 years, and any new policies or directives pertaining to limiting damages, enhancing safety, etc. during private aircraft searches over the past the same time period.

A. Commissioner Hallett:

The following are the claims, by region, filed against Customs as a result of searches of private aircraft over the past two years.

NORTHEAST REGION

CHIEF COUNSEL - JOHN R. DEROMOET

YEAR	CLAIMANT	CLAIMED	PAID
1990	SETH WASHBURNE	$200.00	$127.00

NEW YORK REGION

CHIEF COUNSEL - MELVYN MINSKY

NO CLAIMS TO REPORT FOR THE TWO YEAR PERIOD.

NORTH CENTRAL REGION

CHIEF COUNSEL - SAUL PERLA

NO CLAIMS TO REPORT FOR THE TWO YEAR PERIOD

SOUTHEAST REGION

CHIEF COUNSEL - K. BROOKS THOMAS

NO CLAIMS TO REPORT FOR THE TWO YEAR PERIOD.

SOUTH CENTRAL REGION

CHIEF COUNSEL - HATTIE BROUSSARD

YEAR	CLAIMANT	CLAIM	PAID
1988	JAMES J. GUNNELS	$1,042	
$1,042			

SOUTHWEST REGION

CHIEF COUNSEL - JAMES DESTEFANO

YEAR	CLAIMANT	CLAIM	PAID
1990	LEY LOPEZ ALVAREA	$8,000.00	$1,231.00
1989	BILLY DAVIS	$188.00	$ 0
1988	CHAS DEARING	$643.00	$ 0

PACIFIC

CHIEF COUNSEL - PAUL WILSON

YEAR	CLAIMANT	CLAIM	PAID
1989	ROBERT BOCOX	$6,000.00	PENDING

THIS IS THE SUMMARY REPORT OF ALL REPORTED DAMAGE CLAIMS AGAINST CUSTOMS AS A RESULT OF SEARCHES TO PRIVATE AIRCRAFT OVER THE PAST TWO YEARS VERIFIED BY THE REGIONAL COUNSEL IN EACH REGION. THERE HAVE BEEN NO NEW POLICIES OR DIRECTIVES PERTAINING TO LIMITING DAMAGES OR ENHANCING SAFETY DURING THIS SAME PERIOD.

Chairman GIBBONS. Mr. Anthony.

Mr. ANTHONY. Thank you, Mr. Chairman.

Commissioner Hallett, I have received a draft copy of the Department of Treasury fiscal year 1990 first quarter Financial Managers Financial Integrity Act Report. Have you seen that draft report?

Commissioner HALLETT. Mr. Anthony, not only have I seen that "draft report," I would like to just mention to you that that draft, when it came to our attention, was filled with not only many errors but inaccuracies. I immediately contacted Treasury, and I discussed it with them. That draft not only has been changed, but because there were so many inaccuracies in that "draft," it was never submitted to Deputy Secretary Robson. And I am a little bit distressed that a draft copy like that would arrive here when, in fact, it has been substantially changed.

Mr. ANTHONY. The line of questioning that I had proposed to go into would ask about the unresolved deficiencies and the fact that the Treasury report listed Customs along with the IRS as one of the agencies, specifically responsible for driving the Department's completion rate down to 57 percent. Based on your statement that you have seen this report and that you have made complaints to Treasury, I wish to ask whether they have agreed to change the report or if the report will still show that there are unresolved deficiencies?

Commissioner HALLETT. Yes, Mr. Anthony, not only are they revising that report, there do continue to be unresolved deficiencies. But I think that it is important to point out that while certainly there were some bad techniques in the past, my staff not only meets with Treasury on not only a monthly basis, I myself am meeting on all FMFIA issues on a monthly basis. We are working very closely with Treasury in this area, and, in fact, just for some specifics, if I could read them, because I think it is important.

With respect to FMFIA issues, Customs reported 38 open deficiencies to be corrected in fiscal year 1990. Through March 1990, only 14 deficiencies remain open. Of the 31 corrective actions scheduled through March 1990, Customs has corrected 26, or 84 percent. There are 23 remaining corrective actions planned for completion for the remainder of this year. I am confident that we will reach that goal, but I think the most important thing is the relationship that has been established with Treasury, not only with the Deputy Assistant Secretary Nummy at our regular meetings with him, but with the really concerted effort that we are making to deal with internal controls. It is a very high priority for me, and you certainly have my commitment that it will continue.

Mr. ANTHONY. Well, the reason I asked Chairman Gibbons to yield for an additional question is because for the last year, year-and-a-half, Customs has bragged about the fact that resolution of these deficiencies is a high priority item. It is somewhat disturbing, therefore that the report will show you to have slipped further behind. This is inconsistent with what we have been hearing from other witnesses and even from you.

As you say that the draft report is going to be changed, I will wait until the final report is released. But you understand the thrust of the inquiry, and that is, if you insist you are doing a good job and yet the report shows slippage in performance, then that

certainly does not look good from the perspective of the Oversight Subcommittee function. I will wait to see if the executive summary still shows Customs to be a problem agency. And if it does, I would certainly encourage you to immediately resolve those deficiencies and to reduce their numbers to some tolerable level; certainly to meet the deadlines within which Customs has agreed to resolve them.

Commissioner HALLETT. I appreciate that, Mr. Anthony. I think it is important to point out that we have made a great deal of progress in the last month, and I think it is also important to point out that both Customs and IRS have 10 times as many people in our agencies as many of the other agencies. And so we have much more to deal with, and I think that we are making a lot of progress. And I look forward to being able to report back to you on the continued progress in the area of internal controls.

Mr. ANTHONY. Well, then, I think, Chairman Gibbons, maybe a proper thing to do would be to compare the draft report that we have—to the final draft. Mentioning this draft report was sort of like sticking a needle in the Commissioner. She jumped to attention when I mentioned it, so she has obviously——

Commissioner HALLETT. Well, I have already jumped at other people.

Mr. ANTHONY. I had a feeling that you had, based on the reaction I got when I brought it up. But I am pleased that you had seen it, and I am pleased that you had taken some action.

But maybe the proper thing for us to do, Chairman Gibbons, would be to compare the final approved first quarter report with the draft to see what kind of impact the Commissioner actually did make, and to compare the two to see if there are additional inquiries that we should legitimately make in terms of the numbers of deficiencies unresolved and the number of deficiencies which exist, so that we can continue to perform proper oversight.

I would just like to close by saying to the witnesses here that, although we might highlight special areas where we think the agency has not done a proper job, I think we have all been very impressed—I certainly have been—with your demeanor and with your spirit. I think you will get a lot of cooperation out of both the Oversight Subcommittee and the Trade Subcommittee in giving you the tools you need to get this agency up and running.

[The draft report follows:]

33-400 0 - 90 - 4

The Department of the Treasury

OFFICE OF THE COMPTROLLER

DRAFT

Fiscal Year 1990

First Quarter Report

on the Bureaus' Implementation of the

Federal Managers' Financial Integrity Act

for the Three Months Ended December 31

FINANCIAL SERVICES DIRECTORATE

MARCH 1990

REPORT SUMMARY

This quarterly report describes Treasury bureaus' activities in fulfilling the requirements of the Federal Managers' Financial Integrity Act of 1982 (FMFIA) to evaluate and improve their internal control and accounting systems during the first quarter of fiscal year 1990. The first quarter's results show that:

- Most Treasury bureaus did reasonably well in completing scheduled actions to correct previously identified deficiencies. However, the Customs Service and Internal Revenue Service have experienced problems in meeting corrective action deadlines. These problems result in an overall corrective action completion rate of only 57%.

- Treasury bureaus have done a good job in conducting current year internal control and accounting systems evaluations in accordance with their plans. Eighty-seven percent of evaluations scheduled to begin during the first quarter were actually started, with 38% having been completed during the quarter. The completed reviews have not identified any new material deficiencies.

- Several bureaus (Mint, Internal Revenue Service, and Departmental Offices) have experienced problems in formulating and implementing appropriate internal control evaluation plans.

- The Office of Thrift Supervision has not yet developed an internal control evaluation plan.

- Two bureaus - Customs and Internal Revenue - have the most significant FMFIA issues and require the most aggressive management oversight and monitoring efforts.

The Office of the Comptroller is working with all Treasury bureaus to improve their management controls, but is naturally directing a large portion of its limited resources to those bureaus experiencing the most problems. It must be remembered that the resolution of many FMFIA deficiencies depends on the development and installation of sophisticated computer systems. These types of systems often take several years to become operational. Thus, management control improvements often require long-term solutions, and dramatic results should not be expected in the short term or on a quarter-to-quarter basis.

BACKGROUND

The Federal Managers' Financial Integrity Act of 1982 (FMFIA) is intended to ensure that agency internal administrative and accounting control systems comply with principles and standards prescribed by the Comptroller General of the United States and the Office of Management and Budget.

Administrative controls are the plan of organization and procedures and records that are concerned with the decision processes leading to management's authorizations of transactions. Inadequacies in this area are referred to as *internal control weaknesses*. An example of this type of control would be procedures regarding responses to Freedom of Information/Privacy Act inquiries.

Accounting controls comprise the plan of organization and procedures and records that are concerned with the safeguarding of assets and the reliability of financial records. Deficiencies relating to these functions are referred to as *instances of nonconformance*. An example of an accounting control would be the reconciliation of subsidiary property records to the accounting control records.

The Comptroller's quarterly bureau visits and quarterly report represent the culmination of each quarter's FMFIA activities. Each bureau's year-end FMFIA report to the Secretary is analyzed by the Office of the Comptroller for reasonableness, consistency and materiality for consolidation into the Departmental report.

RESULTS OF ACTIVITY TO CORRECT DEFICIENCIES

The Department reported 79 deficiencies in its 1989 FMFIA Report to the President and Congress, after adjusting for 3 deficiencies subsequently determined to not be material. These 79 deficiencies will be resolved through the implementation of 145 separate corrective actions which in some cases span several fiscal years. During the first quarter of fiscal year 1990, Treasury bureaus had planned to complete 47 corrective actions. Of the 47, 27 were actually reported as corrected, with the remaining 20 rescheduled for subsequent periods. Thus, our success rate is only 57%. *Figure 1* below depicts the overall composite completion rate and the rescheduled percentage of the scheduled corrective actions for the first quarter.

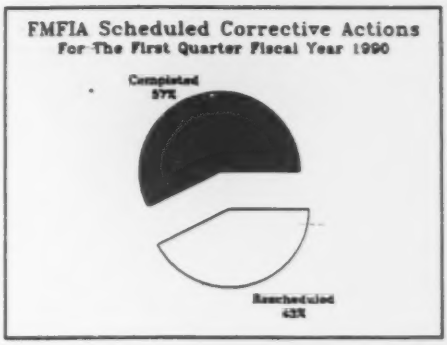

Figure 1

Most Treasury bureaus have done reasonably well in meeting their self-imposed target dates for corrective actions. However, two bureaus - the Customs Service and the Internal Revenue Service - account for 15 of the 20 deficiencies which were not completed on schedule. As both Customs and Internal Revenue are large bureaus having multiple missions which are geographically dispersed, relatively large numbers of deficiencies and the resulting corrective actions are to be expected. Nonetheless, corrective actions should be completed as scheduled, and the Comptroller's Office will continue to emphasize the importance of taking corrective actions in a timely manner, especially for the Customs and Internal Revenue Services.

Table I on page 4 displays the statistical results of scheduled first quarter corrective actions for all bureaus.

Federal Managers' Financial Integrity Act
Quarterly Data Report
Quarter Ended December 31, 1989

TABLE I

Bureau	Unresolved Deficiencies 1/ at Oct. 1, 1989	Corrective Actions Required at Oct. 1, 1989	Corrective Actions Scheduled for Completion this Quarter	Corrective Actions Completed	Rescheduled for Completion at a Later Date
Alcohol, Tobacco and Firearms	5	6	2	1	1
Comptroller of the Currency	0	0	0	0	0
U.S. Customs Service	33 2/	70 2/	22	11	11
Departmental Offices	10	15	3	2	1
Engraving and Printing	0	0	0	0	0
Federal Law Enforcement Training Center	0	0	0	0	0
Financial Management Service	8	18	8	7	1
Internal Revenue Service	10	19	8	4	4 3/
U.S. Mint	6	8	1	1	0
Office of Thrift Supervision	0	0	0	0	0
Public Debt	6	6	3	1	2
Savings Bonds Division	0	0	0	0	0
U.S. Secret Service	1	2	0	0	0
TOTALS	79	145	47	27	20

1/ There is not a direct relationship between FMFIA deficiencies and corrective actions. Usually, FMFIA deficiencies require several corrective actions over periods of time longer than one year to be corrected and completed.

2/ These figures are lower than previously reported because further review by the Customs Service, and subsequent Departmental approval, resulted in the withdrawal of several deficiencies and the related corrective actions which were determined to be immaterial or duplicative.

3/ IRS has done its part to complete a corrective action required for material internal control weakness 89-01; however, because the Office of Inspector General has not completed its portion of the corrective action, the step cannot be considered completed.

MANAGEMENT CONTROL PLAN ACTIVITY

Management control plans segment each bureau's activities into "assessable units" for FMFIA review purposes. Each assessable unit is assigned a risk rating based on management's judgement of that unit's inherent risk. The rating is used to prioritize the evaluation of internal controls for the bureau's assessable units. Treasury's bureaus began 1990 planning to perform internal control reviews of 351 assessable units. Eighty of these internal control evaluations were scheduled to begin during the first quarter of the year. Seventy of these evaluations (88%) were actually started, and 31 were completed during the quarter. As the first quarter requires significant resources to complete prior year's reports and related activities, this is a respectable level of activity and is indicative of the bureaus' overall commitment to improving management controls. *Figure 2* below depicts the overall progress made by all bureaus in conducting the scheduled evaluations from their fiscal year 1990 management control plan.

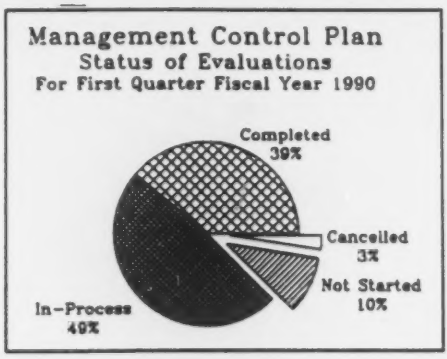

Figure 2

Departmental Offices, the Internal Revenue Service, and the Mint have experienced problems in preparing and implementing management control plans that appropriately address Departmental and Office of Management and Budget guidelines. In addition, the recently created Office of Thrift Supervision has not yet developed a management control plan. The Office of the Comptroller is working with these bureaus to remedy their problems and ensure that all bureaus' management control plans are prepared and implemented on a consistent basis.

Table II on page 6 displays first quarter evaluation activity by bureau.

Management Control Plans
Status of Evaluations
Quarter Ended December 31, 1989

TABLE II

Bureau	Total Evaluations Scheduled for FY 1990	Scheduled for First Quarter Activity	Completed	In-process	Not Started	Cancelled
Alcohol Tobacco and Firearms	60	21	19	2	0	0
Comptroller of the Currency	22	3	0	2	1	0
U.S. Customs Service	54	26	6	18	0	2
Departmental Offices	31	0	0	0	0	0
Engraving and Printing	44	12	1	10	1	0
Financial Management Service	37	1	0	1	0	0
Federal Law Enforcement Training Center	4	2	0	2	0	0
Internal Revenue Service	32 1/	0	0	0	0	0
U.S. Mint	6	0	0	0	0	0
Office of Thrift Supervision	0 2/	0	0	0	0	0
Public Debt	12	4	1	2	1	0
U.S. Secret Service	22	5	0 3/	0	5	0
U.S. Savings Bonds Division	27	6	4	2	0	0
TOTAL	351	80	31	37	8	2

1/ IRS currently cannot provide monthly reporting on the status of reviews in the MCP. IRS will be revising its MCP which will result in additional reviews added to the MCP and provisions for monthly reporting on their status beginning in April.

2/ OTS does not have an MCP for fiscal year 1990. The delay in development of an MCP has been due, in part, to the passage of the Financial Institutions Reform, Recovery and Enforcement Act which has resulted in the 12 District Offices of the OTS coming under the Headquarters FMFIA review process for the first time. OTS plans to have the MCP in place by March 31, 1990.

3/ The Secret Service is developing a new evaluation program, and plans to implement the new program during the second quarter of FY 1990. The Service anticipates completing all scheduled reviews by the end of FY 1990.

SIGNIFICANT BUREAU ISSUES

The following is a summarization of the most significant FMFIA issues at Treasury bureaus. A more detailed explanation of each item, and additional less-significant items pertaining to each bureau, is provided in the individual bureau reports found in the Appendix.

CUSTOMS SERVICE

The Customs Service is:

- o replacing its primary accounting system over the next four years in order to correct many long-standing FMFIA deficiencies. Continued aggressive Departmental oversight is needed to provide adequate support and ensure that interim milestones are being met;

- o experiencing problems in meeting self-imposed FMFIA target dates for completing corrective actions. Only 50% of scheduled corrective actions were completed during the first quarter of fiscal year 1990. Slippage in corrective action target dates has historically been a problem for Customs at least since Customs developed a "comprehensive corrective action plan" in 1987. Customs believes it may be penalizing itself by showing too many interim corrective actions for each deficiency, thereby adversely impacting Customs' completion ratio. While we are exploring the merits of Customs' argument, the fact remains that only half of the scheduled corrective actions were completed. Therefore, even more aggressive Departmental oversight may be needed in this area;

- o implementing a reorganization proposal which has been approved by the Department, subject to the submission and approval of additional details concering the reorganization. The reorganization transfers all automated data processing functions to a new Assistant Commissioner for Information Management, establishes the position of Assistant Commissioner for Management, redefines the duties of the Comptroller, and provides for a separate Office of Procurement. One of the major goals of the reorganization is to allow top Customs management to better focus on financial management needs; and

- o preparing a detailed response to the Subcommittee on Oversight's recently released report on Customs' commercial operations. The report contains several FMFIA-related findings which will be addressed by both the Department and Customs. Departmental management will be, in all likelihood, requested to testify before the Subcommittee on the report's contents.

U.S. CUSTOMS SERVICE
Quarterly Report on Federal Managers'
Financial Integrity Act (FMFIA) Activities
First Quarter of Fiscal Year 1990

Statistical Summary

FMFIA Corrective Action Activity

Unresolved Deficiencies at Oct. 1, 1989	Corrective Actions Required at Oct. 1, 1989	Corrective Actions Scheduled for Completion this Quarter	Corrective Actions Completed	Rescheduled for Completion at a Later Date
33	70	22	11	11

Status of Current Year FMFIA Evaluations

Total Evaluations Scheduled for FY 1990	Scheduled for First Quarter Activity	Completed	In-process	Not Started	Canceled
54	26	6	18	0	2

Significant Issues

The current significant FMFIA issues at Customs are as follows:

- o replacement of the primary accounting system;
- o problems in meeting FMFIA corrective action scheduled completion dates;
- o reorganization proposal related to financial management issues; and
- o report recently issued by the Subcommittee on Oversight of the House Ways and Means Committee.

REPLACEMENT OF THE PRIMARY ACCOUNTING SYSTEM

The primary issue at the Customs Service is the replacement of the Customs Accounting and Management Information System (CAMIS) with the Asset Information Management System (AIMS). Most of Customs' well-publicized FMFIA deficiencies arise from systems deficiencies in CAMIS and a lack of effective management oversight over CAMIS. After the initial identification of these deficiencies, Customs planned to make the improvements to CAMIS which were necessary to bring CAMIS into compliance with the Comptroller General's standards and, more importantly, provide Customs management with useful information on a timely basis. As the CAMIS improvement project progressed, it became evident that the scope of the necessary improvements was larger than originally envisioned. Customs then determined that the entire CAMIS system needed a major overhaul.

The conceptual design for the new system (AIMS) was approved by Customs management in December 1989. The AIMS development schedule calls for implementation of various system modules over four fiscal years - 1990 through 1993. Customs management reports that AIMS will be a centralized, integrated management information system, and will incorporate the positive attributes of CAMIS rather than building a new system from scratch.

Our concern is that Customs is once again embarking on a new plan. In 1987, at the Department's request, Customs developed an FMFIA corrective action plan that was to resolve all outstanding FMFIA deficiencies and significant audit recommendations. In 1988, Customs formed an FMFIA task force to resolve all known FMFIA deficiencies, most of which required systems improvements to correct. Now, in 1990, we have the AIMS project, which is billed as the panacea for all Customs' management information systems problems. It must be noted that Customs has reported the implementation of many corrective actions during this period, which when validated will represent significant progress toward achieving compliance with the GAO standards. Due to these reported improvements, the Department was able to provide "limited assurance" in its 1989 FMFIA Report that Customs accounting and internal control systems were in compliance with the Comptroller General's standards. This is a major step forward from the "nonassurance" of 1987 and 1988. However, **we believe the Department must continue to work aggressively with the Customs Service to resolve its FMFIA problems and validate its corrective actions, while at the same time insisting that the AIMS project be completed in a timely manner before another major improvement project is proposed.**

PROBLEMS IN MEETING FMFIA DUE DATES

Another Customs Service issue is the slippage being experienced in the accomplishment of scheduled FMFIA corrective actions. **During the first quarter of fiscal year 1990, Customs completed only 6 of the 15 scheduled corrective actions (40 percent).** For many of these actions, the delays are relatively minor in that they are now scheduled for completion during the second quarter of 1990. Examples include the issuance of a policy and procedures directive on the timely deposit of collections, which has been delayed from November 1989 until February 1990. However, some corrective actions have been rescheduled for rather extended time periods. For example, the review of open obligations to determine those that should be removed from the books was originally supposed to be completed by December 1988, was rescheduled to December 1989, and is now shown as having a September 1990 completion date. Customs has provided explanations for these slippages, and is aware that the failure to meet scheduled due dates has been a contributing factor to Customs' credibility problems. It is also important to note that Customs did not discuss any due date extensions with the Department.

EFFECTS OF REORGANIZATION PROPOSAL ON FINANCIAL MANAGEMENT

The Customs Service is implementing a reorganization proposal which has been approved by the Department, subject to the submission and approval of additional details concering the reorganization. The reorganization transfers all automated data processing functions to a new Assistant Commissioner for Information Management, establishes the position of Assistant Commissioner for Management, provides for a separate Office of Procurement, and redefines the duties of the Comptroller to specifically deal with financial management functions. One of the major goals of the reorganization is to allow top Customs management to better focus on financial management needs.

SUBCOMMITTEE ON OVERSIGHT REPORT

While not focused solely on FMFIA activities, the report recently released by the Subcommittee on Oversight of the House Ways and Means Committee raises several financial management and internal control issues that will need to be addressed by Customs management and the Department. Focused primarily on Customs' commercial operations, **the report contains the following FMFIA-related findings:**

- According to the Subcommittee, Customs has violated Federal spending laws. This refers to the potential 1987 Antideficiency Act violation, which is the subject of the current audit by our Office of Inspector General, and

the backdating of procurement documents at the end of fiscal year 1988, which was also the subject of an OIG audit;

- o Customs' Automated Commercial System (the revenue accounting system) has serious flaws;

- o Customs' accounting controls were neglected for years and are in total disarray; and

- o Customs' seized property program loses money and is mismanaged.

We understand the report's contents will be the subject of upcoming hearings before the Subcommittee on Oversight, and the Department undoubtedly will be requested to testify. The report does not cast the Department's fulfillment of its oversight responsibilities in a favorable light. **The Subcommittee's findings should be discussed and addressed quickly at the Departmental level.**

Specific Issues Covered at Quarterly Visit

Several Departmental topics were discussed with all bureaus during the Comptroller's quarterly bureau visits, including the Department's Management Control Improvement Program, "early warning system" criteria, and anticipated legislation establishing a governmentwide chief financial officer. In addition to these standard topics, the following items were covered at the Customs Service meeting:

- o The Comptroller noted that the systems improvement project briefing provided by Customs to the Office of Management and Budget was well received by OMB. We also reminded Customs that OMB had requested Customs to develop some bureau unique "early warning" indicators that could be forwarded to OMB on a regular basis. The Department requested that Customs furnish the information before the end of February 1990.

- o The Comptroller requested Customs' views on the $5 million dispute with the Virgin Islands, which was the subject of a General Accounting Office report issued in December 1989. The GAO's findings were inconclusive, and Customs continues to maintain that it has already paid the Virgin Islands the funds in dispute. This matter is now being handled by the Office of Assistant Secretary for Enforcement with assistance from Finance and Management.

- Customs provided a brief overview of the AIMS project, and agreed to include a report on AIMS in the next monthly FMFIA briefing for Deputy Assistant Secretary Nummy.

- The Comptroller's staff inquired as to whether the General Accounting Office had begun audit field work in connection with its audit of Customs' Forfeiture Fund. (The 1988 Drug Bill mandates annual financial audits of Customs' and Justices' Forfeiture Funds.) Customs responded that the field work has started for the 1989 audit; it is scheduled for completion in September 1990.

Management's Commitment to Improving Management Controls

This is an extremely difficult assessment to make, as the signals being sent by various Customs activities are inconsistent. **On the positive side, Customs has:**

- reported significant progress in correcting its deficiencies during fiscal year 1989;

- committed significant resources to revamping its financial management system (i.e, the AIMS project);

- resolved the temporary "acting" status of the National Finance Center Director and begun recruiting to fill the Deputy Director position, which has been vacant for more than a year;

- formed an internal review team to verify the accuracy and effectiveness of reported corrective actions;

- made good progress in completing the FMFIA reviews scheduled for the current fiscal year (54 reviews are scheduled for 1990 - all 6 reviews scheduled for the first quarter were completed, and 18 additional reviews were in process as of December 31st); and

- demonstrated management commitment in resolving deficiencies by having responsible staff report directly to the Deputy Commissioner, who in turn attends the monthly briefings given to the Department. The Deputy Commissioner's direct involvement appears to keep the spotlight on problem resolution.

Areas that require attention would indicate Customs has:

- o moved slowly in addressing its FMFIA corrective actions for fiscal year 1990 in accordance with the originally scheduled due dates (only 6 of 15 corrective actions planned for the first quarter were actually completed);

- o included language in an internal Customs memorandum indicating that certain actions, such as improving relationships with upper Treasury management, are more important due to the appearance they create than are truly substantive measures in correcting deficiencies;

- o demonstrated a reduced level of interest in the quarterly FMFIA meeting in that neither the Customs Comptroller nor any of his senior financial staff attended the recent session with the Departmental Comptroller, which is a significant departure from past practices; and,

- o provided a slow response to the potential Antideficiency Act violations for fiscal year 1987 with the Department's Inspector General and Management staff.

The positive factors are certainly encouraging, but we are concerned by the range of areas that require attention. On balance, **we believe that Customs' management is serious about its commitment to improve management controls. However, continued aggressive Departmental oversight is still required to ensure Customs attains its goals.**

Commissioner HALLETT. Thank you.

Mr. ANTHONY. I thank you, Mr. Chairman, for allowing me that additional inquiry.

Chairman GIBBONS. Well, Mr. Anthony, you made a good suggestion there. We will certainly do that. We will certainly follow through.

Mr. Schulze.

Mr. SCHULZE. Thank you, Mr. Chairman.

Could you go into a little bit more detail on a subject which was raised by Chairman Pickle and one that gives me concern. In regard to our recommendations for improved financial internal controls, I am quite disturbed by the GAO report on serially numbered forms.

Although you did report this as one of your weak areas at the end of 1989, GAO found an almost total breakdown of the process, several million documents could not be accounted for over 1987 to 1988, and, in addition, nearly 5 million unaccounted-for documents were written off from computer records over the last five years.

GAO is disturbed that both the Deputy Commissioner and the Comptroller claim to be unaware of this problem.

Commissioner, can you very briefly for the committee describe or explain how these forms are used and how the duty is collected and recorded so that we understand this process?

Commissioner HALLETT. First of all, Mr. Schulze, I think in terms of the actual background, I am probably pretty weak on that, other than to say that the problem did exist. We are now working to correct it and——

Mr. SCHULZE. Perhaps Mr. Lane could answer that, because he has a little more knowledge.

Commissioner HALLETT. I was just going to suggest that.

Mr. SCHULZE. That would be fine.

Mr. LANE. Yes, sir.

The GAO report is accurate, we did write off about 4.5 million forms. In addition, they have sent us a tape this week which has provided additional information on that which we are now analyzing.

Upon receiving their report——

Mr. SCHULZE. If you could just back up just one second, if you would please describe for the committee how these receipts are used and how they are used physically so that the other members understand what these receipts are used for and where and when and how?

Mr. LANE. The receipts are used for a variety of functions. For example if an inspector were to go out in the middle of the night on a private aircraft, he would take one of these forms, he would collect money, he would fill it out, give the passenger a receipt and then come back and turn that form in and we would make a collection action.

Mr. SCHULZE. Is this a form receipt book with a carbon copy in it that is sequentially numbered?

Mr. LANE. Yes, sir.

Mr. SCHULZE. All right, but they are also used on ships, in airports——

Mr. LANE. Warehouses——

Mr. SCHULZE. Everywhere that you collect money where it just happens that there is not a cash register right there. There might be a cash register 100 feet away but these receipts are used all over the place, is that correct?

Mr. LANE. All over the place, that is correct.

Mr. SCHULZE. Now, if somebody pays in cash—$60, $80, $500—pays in cash and gets a receipt, then what happens to that money?

Mr. LANE. The inspector brings it back to the entry division, the form is filled out and the deposit is made.

Mr. SCHULZE. All right, now, if that book that he has in his pocket has been eliminated and is no longer in the sequence, what check would there be or how would you determine that that money was missing?

Mr. LANE. We would have to have an internal control where we would go out and check the book.

Mr. SCHULZE. In other words, if I were an inspector and I had two books in my pocket and I kept one of them and the other one I turned in, there would be no way to tell whether that money was being pocketed?

Mr. LANE. There are great vulnerabilities in the system as it exists today.

Mr. SCHULZE. There would be no way to tell, so that we actually have no way to estimate how much could be lost. Do you know, Mr. Lane, how much is collected using the forms, how much money goes through those receipt forms out of the $20-plus billion collected?

Mr. LANE. How much?

Mr. SCHULZE. Out of the $20 billion collected, can you give me an idea how much is collected using the forms?

Mr. LANE. Well, I do not know that. We are looking to find that out. I know it is not the billions that GAO indicated.

Mr. SCHULZE. Well, I understand that it is somewhere between $600 or $700 million, would you agree with that kind of range?

Mr. LANE. No, I would not agree with that. Our belief is that $125 million is collected in actual cash including currency seizures.

Mr. SCHULZE. Mr. Lane, should that not be something that we would have a distinct and specific answer on—how much is collected by the receipt books? It seems to me that under any accounting system you would say this is how much we have collected.

Mr. LANE. OK——

Mr. SCHULZE. But we do not have that.

Mr. LANE. It is $125 million in cash collections.

Mr. SCHULZE. The $125 million were the cash collections, but we do not know how much might have been diverted?

Mr. LANE. That is right assuming any has been diverted; but out of $20 billion most of that——

Mr. SCHULZE. Mr. Lane, when were you made aware of the extent of this problem and what has been done up to now to correct it?

Mr. LANE. I think I was made aware 6 to 8 weeks ago. We immediately put a group together to identify every deficiency noted by GAO and to develop a plan for correcting them.

Mr. SCHULZE. Can you tell us about the review of the northeast region and did it uncover serious problems?

Mr. LANE. That they uncovered some serious problems?

Mr. SCHULZE. In the Northeast region, can you tell us about the review of the northeast region and did it uncover serious problems?

Mr. LANE. As a part of our new emphasis on internal controls, we established a team headed by a district director and other field personnel to go up and look at all of the internal controls in the northeast region.

The objective was to find out what were the internal controls and those that had been verified as completed, what was the status of them and were they actually being carried out.

And the result of that was that we had some significant problems in that regard and we are taking corrective action on that.

I think that the important results of the reviews are that we did not really find any actual losses of revenue or any indications that there was a problem like that.

Mr. SCHULZE. But Mr. Lane, there is no way to tell, is there, if there is no paper trail, if there is no receipt, how can you tell if there is money missing? If I give somebody a receipt and there is nothing that shows, what happened to the cash, there is no way to tell.

Mr. LANE. Of course not all internal controls——

Mr. SCHULZE. But it could be hundreds of millions of dollars.

Mr. LANE. No, I would not say that, not in the northeast region.

Mr. SCHULZE. Well, I am happy to hear you say that, you say that it could not be hundreds of millions of dollars?

Mr. LANE. That is correct.

Mr. SCHULZE. Well, I am glad to hear that because I think we disagree on that.

Mr. Lane, who was the individual responsible for changing the forms from unused to used, that status in the computer, who was the individual who made that decision and made that change?

Mr. LANE. I do not know who that was.

Mr. SCHULZE. Does that make any difference?

Mr. LANE. Well, it does make a difference and that is what we are going to find out in our review of the information GAO provided—exactly which forms were converted to "used status."

Mr. SCHULZE. But we do not know this yet?

Mr. LANE. No.

Commissioner HALLETT. Congressman, might I suggest that we get back to you with a full report on this and we will be happy to provide not only those names but more information.

Mr. SCHULZE. Well, Commissioner I think this is an extremely serious matter and we know who that individual was and if you do not know, I am concerned about the personnel problems at Customs. And if such a major problem as that cannot be handled and handled quickly and correctly, I really have great concern about where we are going and how we are going to do it.

I am somewhat disappointed at the responses but we will leave that up to the rest of the committee.

Thank you, Commissioner, and thank you, Mr. Lane.

[The following was subsequently received:]

Q. Congressman Schulze:

Provide a full report on serially numbered forms breakdown, including names of employees involved.

A. Commissioner Hallett:

The audit prepared by the General Accounting Office provides a full report on the breakdown of serially numbered forms. Customs attributes the breakdown to various factors including the lack of a formal management review process that could have been used to assess the program; fragmented automated revenue accounting systems; and the failure of individuals to follow established procedures. The following discussion presents some specific details relating to these factors.

Customs did not have a formal management review process in place to evaluate the effectiveness of internal controls over serially numbered forms. This is now enhanced by an established formal internal control and compliance review process of the collection function that will determine if the appropriate procedures are in place and in fact are adhered to. A directive describing the serially numbered forms process and responsibilities was distributed in March, 1990. The procedures will also be adapted to Customs Automated Commercial System (ACS) which will be changed to track individual documents to the indivduals that are assigned the forms.

Prior to ACS, data in the Customs Revenue Accounting System and Independent Collections System were used as a basis for conversion to ACS. In that conversion, the documentation supporting the distributed forms was not kept up to date. The analysis prepared by GAO did not review old collection tapes to compare the data on these tapes to the current data in ACS. This type of analysis may show that serially numbered forms in question were used and that the conversion from unused to used can be supported by system documentation. Customs will be researching data on old collection tapes to continue to reconcile to the current information contained on the data tapes provided by GAO. The results of the analysis will be reported to the Subcommittee.

Finally, although procedures were in place to hold individuals accountable for the use of serially numbered forms, the procedures involved a manual log and management oversight of the program was inadequate. This will be remedied by the automated accounting of forms through ACS which Customs plans to enhance through the acquisition of modern technology which can eliminate the requirement for any form at all. The responsibility for any decisions regarding serially numbered forms rests with the Deputy Commissioner of Customs.

Chairman GIBBONS. I think I would rather have a receipt book that was not accounted for and stand around Kennedy Airport than a congressional pension. I believe that you could raise more money in a shorter period of time. [Laughter.]

That is—I am sorry to learn of that. And I hope that there will be better internal controls in your department because one of the things that destroys the credibility of our whole revenue collecting system is the perception that it is not being run in a tight businesslike manner. While we encourage you and your department to be polite and humane in dealing with people, we want the department to be very businesslike. If you run into laws that are ridiculous and you have to enforce them, let us know. If you run into laws that are unworkable please let us know.

I think there is one message that comes through from all of the questioning that I have been listening to and that is that you have inherited sort of a mess down there Madam and we are very impressed with your personal ability but we will just be around here checking. I know that you have got the integrity, you have got the enthusiasm, and you apparently have the ability but we want to see it grow to be one of the finest departments in the United States. It is a tough job—law enforcement, the collection of money, dealing with the public as you have to, but we think you can do it and we want to help you, but unfortunately we will be checking on you too.

Commissioner HALLETT. Mr. Chairman—I am sorry.

Mr. PEASE. After you, Madam Commissioner.

Commissioner HALLETT. Thank you, Congressman Pease.

I would just like to say that yes, we are a big agency that has had problems and we will continue to have problems but I think it is the finest agency that we could have today in any customs service, because of the men and women who make up the Customs Service. They have a tough job. They are conscientious, honest, hard-working and enthusiastic men and women.

And I have made, I believe, important reorganization changes that will help to make us even more efficient. We are going to have great demands placed on us to work smarter and to think smarter and I think we are going to do all of that. We will work very hard not only to make sure that we spend a tremendous amount of our time and effort on internal controls but certainly not at the expense of all of the other important programs. They will have to go hand in hand. I welcome your oversight and I think that it uncovers problems that we may not have uncovered. We are not perfect but we are going to work darn hard to be perfect. And if we have a report card next year, I hope our report card will be much, much better and I believe it will be because we will be working together to accomplish these important goals.

Chairman GIBBONS. Well, I know that all of our staffs tend to cover up for us and perhaps do not let things come to our attention that we would be better off knowing.

But I want the word to go out in your agency that nobody better keep from the Commissioner anything of any substance. If there is a mistake made, let it come forward to you. And I am sure you will deal with it correctly.

Commissioner HALLETT. Thank you.

Chairman GIBBONS. Are there further questions of this panel?

[No response.]

Chairman GIBBONS. I want to thank you very much for your fine testimony and I wish you good luck.

Commissioner HALLETT. Thank you, Mr. Chairman, members.

Chairman GIBBONS. We have the Joint Industry Group now, that is composed of Kenneth Kumm who is accompanied by Mr. Cross; Mr. Outman; and Mr. Rose; and Mr. Hardy.

Mr. FRENZEL. Mr. Chairman.

Chairman GIBBONS. Yes, sir?

Mr. FRENZEL. May I introduce Mr. Kumm to this committee?

Chairman GIBBONS. Oh, certainly.

Mr. FRENZEL. Mr. Chairman, it is not that he is unfamiliar to the committee, but I merely want to point out at this time that Ken and I used to do business together thousands of years ago when he was still, as he is now, employed by the 3M Co. and I had not yet fallen into the public trough. And we have known each other for many years and I have always admired the work that he did, both for the industry and for his employer. He has been a frequent testifier and adviser before this committee.

I am not sure whether he inspired me or I inspired him but this is likely to be his swan song. He is retiring and has done wonderful work for the Joint Industry Group. I just simply want to inform the committee that this may be one of its last opportunities to deal with Ken Kumm. I just want to tell him personally how much I have enjoyed working with him over the years.

Thank you, very much, Mr. Chairman.

Chairman GIBBONS. Ken, I do not know what you did on him but you did a good job on him anyway and we are going to miss the hell out of him when he goes, I can tell you.

Mr. KUMM. He has been a great friend and a good participant in the Government process. Thank you for those kind words, Bill, I appreciate that.

Chairman GIBBONS. You may go right ahead.

Let me say for those in the audience that this will be our last panel this morning and we will break for lunch and then come back about an hour after we break.

Go ahead, please.

STATEMENT OF KENNETH A. KUMM, CHAIRMAN, JOINT INDUSTRY GROUP, ACCOMPANIED BY AARON CROSS, CHAIRMAN-ELECT, AND PROGRAM DIRECTOR, INTERNATIONAL SUPPORT PROGRAMS, IBM CORP.

Mr. KUMM. I appear here as the chairman of the Joint Industry Group which is a coalition of more than 100 trade associations and business and professional firms interested in Customs and related trade facilitation matters.

I recently retired from the 3M Co. as manager for customs and trade affairs and this will be my last appearance before the subcommittee as chairman of the Joint Industry Group. I appreciate the courtesies that you and other members and the staff have extended over the past 5 years that I have chaired this excellent organization.

I am accompanied by Aaron Cross of the IBM Corp. who is chairman-elect of the Joint Industry Group and with your permission, Mr. Cross would like to say a few words at the end of my summary statement.

I will provide a brief overview of the Joint Industry Group's concerns with the Customs Service's commercial operations, and then we have three other members who chair committees within the Joint Industry Group who will cover various aspects of the legislative recommendation. I ask your permission to have those written statements also included in the record.

Chairman GIBBONS. Without objection they will be included in the record.

Mr. KUMM. We commend the members of the subcommittee for devoting time and effort towards improving the commercial and trade operations of the U.S. Customs Service. We very much appreciate this opportunity to present testimony at this important hearing.

The findings included in the Oversight Subcommittee's excellent report which are directly related to the Joint Industry Group's own examination of the commercial operations of the U.S. Customs Service are: One, the deterioration in relationship between the international trade community and the U.S. Customs Service. This has improved measurably with the new Commissioner.

Two, essential commercial services have been allowed to deteriorate while drug enforcement role was expanded. Three, most U.S. Customs Service management decisions are made without supporting data or analysis. Five, the automated commercial system has serious flaws; and finally, nine, the U.S. Customs Service abused its authority to seize commercial merchandise.

It was our concern with these kinds of issues which led the Joint Industry Group to establish a legislative task force early last year. The results of the deliberations of that task force are contained in this document, recommendations on the U.S. Customs Service commercial operations. I believe we have furnished this document to the members of the staff and to the members.

Mr. Chairman, I request that this document be placed in the hearing record, or if you prefer in the files of the subcommittee for its consideration.

Chairman GIBBONS. Without objection, it will be placed in the record.

Mr. KUMM. Thank you.

We are extremely pleased that the legislative recommendations have been incorporated in the proposed Customs Informed Compliance and Automation Act of 1990 which was introduced by Congressmen Pease and Frenzel, which is H.R. 4689. The task force of the Joint Industry Group is cochaired by Robin Lanier, now of the International Mass Retail Association, and Jon Kent of Kent & O'Connor, and the Washington representatives of the National Brokers and Forwarders Association. We are indebted to these individuals and others on the Joint Industry Group task force for their hard work, all of it contributed voluntarily.

In looking to the future, the Joint Industry Group concluded that there must be an evolving cooperative relationship between Customs and the trade community based on the interrelated factors of

one, informed compliance with the responsibility for informing and being informed running in both directions. And two, automation of all Customs operations involving the electronic interface between business transactions and Customs processing, verification and control. Without it, Customs will truly be inundated and trade could come to a halt.

These two key factors, informed compliance and automation form the basis of our recommendations and are given expression in the proposed Customs Informed Compliance and Automation Act of 1990.

I would emphasize that we affirmed in our recommendations by the findings of the Oversight Subcommittee's report as spelled out in my written statement.

In summary, we support the amendments of the Customs law with respect to decisions, ruling notices and appeals, penalties, prior disclosure, detentions and seizures, Customs labs and regulatory audits. The proposed amendment to these provisions would make possible the type of informed compliance that will encourage more efficient and effective Customs operations and facilitate international trade.

Further, we strongly support the implementation of a much needed national Customs automation program as is also provided in the proposed Customs Informed Compliance and Automation Act of 1990.

We strongly urge that the subcommittee enact such legislation and in that effort, I assure you, you will have the support and assistance of the Joint Industry Group.

I would like to now introduce Aaron Cross, the chairman-elect of the Joint Industry Group for a few remarks.

[The statement of Mr. Kumm and document referred to, follow:]

STATEMENT OF KENNETH A. KUMM, CHAIRMAN OF THE JOINT INDUSTRY GROUP, AT A HEARING ON THE COMMERCIAL AND TRADE OPERATIONS OF THE U.S. CUSTOMS SERVICE BEFORE THE SUBCOMMITTEE ON TRADE IN CONJUNCTION WITH THE SUBCOMMITTEE ON OVERSIGHT, HOUSE COMMITTEE ON WAYS AND MEANS MAY 2-3, 1990

Mr. Chairman, my name is Kenneth A. Kumm, Chairman of the Joint Industry Group. I recently retired from the 3M Company, as Manager for Customs and Trade Affairs. This will be my last appearance before this Subcommittee as Chairman of the Joint Industry Group. I appreciate the courtesies that you and the staff have extended over the past five years. I am accompanied today by Aaron Cross of the International Business Machines Corporation, Chairman Designate of the Joint Industry Group.

The Joint Industry Group is a coalition of over 100 trade associations and business and professional firms involved in international trade with a direct interest in customs affairs. We appreciate this opportunity to present testimony in this very important hearing. A list of the trade organizations supporting this statement is attached. We have filed with your Subcommittee Counsel a full list of associations and organizations participating in the Joint Industry Group.

We commend you and Chairman Pickle and the members of your Subcommittees for devoting your time and efforts toward improving the commercial and trade operations of the U.S. Customs Service. The Joint Industry Group very actively cooperated with this Subcommittee in the formulation and the enactment of the Customs Procedural Reform Act of 1978, which established the precedent of much closer examination of the Customs Service as an important factor in oversight of U.S. trade policy operations.

REPORT OF THE OVERSIGHT SUBCOMMITTEE

Members of the Joint Industry Group have worked with the Oversight Subcommittee and its staff, and we have reviewed the 16 areas of findings and recommendations contained in the Subcommittee's "Report on Abuses and Mismanagement in U.S. Customs Service Commercial Operations". Again we would like to commend the professional work of the Subcommittee and its staff, and to concur generally with the finding and recommendations in almost all of the areas of concern addressed in the report.

Organizations in various sectors of the trade community have a direct interest in specific findings and recommendations in the Report of the Oversight Subcommittee and will be commenting on their own behalf. Transportation companies, carriers, warehouse operators and brokers and forwarders are specifically concerned with the finding with respect to Cargo Examination, Centralized Examination Stations, processing of airline passengers, surety bonds and the commercial narcotics enforcement program.

The important findings and recommendations on management issues with respect to violation of spending laws, lack of appropriate accounting controls, the need for more efficient and less destructive methods for examining international cargo are not areas that the participants in the Joint Industry Group have addressed specifically in terms of our own recommendations.

We certainly assume that members of the Subcommittees will be pursuing those finding and recommendations.

NEW LEADERSHIP IN CUSTOMS

In that context, the Joint Industry Group would like to express its appreciation for the new leadership in the U.S. Customs Service being made evident by Commissioner Hallett, both in statements and in actions. The renewed willingness in the

Customs Service to consult with the private sector before final decisions are made is welcome, and I am sure I can speak for all participants in the Joint Industry Group when I say that the trade community looks forward to a restoration of a relationship with the Customs Service based on a spirit of cooperation and accommodation.

FINDINGS DIRECTLY OF INTEREST TO THE JOINT INDUSTRY GROUP

The finding included in the Oversight Committee Report which are directly related to the Joint Industry Group's own examina tion of the commercial operations of the U.S. Customs Service are the following:

1. Deterioration of relationship between international trade community and the U.S. Customs Service.

2. Essential commercial services have been allowed to deteriorate while drug enforcement role was expanded.

3. Most U.S. Customs Service management decisions are made without supporting data or analysis.

* * *

5. The Automated Commercial System has serious flaws.

* * *

9. The U.S. Customs Service abused its authority to seize commercial merchandise.

It was our concerns with the kind of issues set forth in these five findings which led the Joint Industry Group to establish a Legislative Task Force early last year. The results of the deliberations of that Task Force are contained in the document, Recommendations on the U.S. Customs Service Commercial Operations circulated by the Joint Industry Group. This document has been made available to Members of both the Trade Subcommittee and the Oversight Subcommittee. We are pleased that the legislative recommendations have been incorporated into legislative language contained in the proposed Customs Informed Compliance and Automation Act of 1990, and we are especially pleased that Congressman Don Pease and Congressman Bill Frenzel have agreed to sponsor the bill for consideration by this Subcommittee.

LEGISLATIVE TASK FORCE OF THE JOINT INDUSTRY GROUP

The Task Force of the Joint Industry Group is chaired by Co-Chairmen, Robin Lanier, now of the International Mass Retail Association and Jon Kent of Kent and O'Connor, and Washington representative of the National Association of Brokers and Forwarders Association. The Task Force is made up of representatives of business firms, trade associations and professional firms, all participants in the Joint Industry Group. It is worth noting, Mr. Chairman, that the Joint Industry Group has a diverse membership. Business interests of our various organizations with respect to commercial operations of the U.S. Customs Service do not always coincide. The Task Force, nevertheless, was able to reach agreement on positions which are supported by a representative cross-section of the trade community, as indicated in the list of "Organizations Supporting the Joint Industry Group's Legislative Recommendations", attached to this statement. Even though some trade organizations could not support the entire package because of one or two issues, and therefore, are not listed, they did participate in the entire process and do support the rest of the recommendations.

Mr. Chairman, I request that the document, Recommendations on the U.S. Customs Service Commercial Operations by the Joint Industry Group, be placed in the hearing record, or if you prefer, in the files of the Subcommittee, for its consideration.

KEY FACTORS IN MODERNIZATION OF CUSTOMS ARE INFORMED COMPLIANCE AND THE NATIONAL AUTOMATION PROGRAM

In looking to the future, the Joint Industry Group concluded that there must be an evolving cooperative relationship between Customs and the trade community, based on the interrelated factors of: one, informed compliance, with the responsibility for informing and being informed running in both directions, and, two, automation of all of customs operations involving an electronic interface between business transactions and customs processing, verification and control.

These two key factors formed the base of our recommendations, and are given expression in the provisions of the bill being introduced by Congressmen Pease and Frenzel. We are affirmed in our recommendations by the findings of the Oversight Subcommittee Report.

The Subcommittee on Oversight found (Finding Number 1) that, "The relationship between the international trade community and the U.S. Customs Service has deteriorated substantially in recent years." Related to this finding, the Oversight Report observed (Finding Number 2), that, "The U.S. Customs Service allowed essential commercial services to deteriorate over the past decade, while its drug enforcement role has expanded." The Joint Industry Group concurs in these findings. In fact, the Joint Industry Group on numerous occasions has testified before this Subcommittee to the effect that while adequate interdiction of elicit drugs and effective enforcement of the laws to stop the flow of drugs are essential, the importance of the facilitation of trade through efficient and effective Customs commercial operations must not be ignored. To state it another way, the tremendous increase in the magnitude and complexity of imports, which has not been matched by adequate growth in staff, has forced the Customs Service to place undue reliance on enforcement measures to the detriment of sound commercial operations. The Subcommittee report states the point very well, "The trade community argues that Customs proper role is to foster compliance with trade laws, not (to) treat them as criminals."

DECISIONS, RULINGS, NOTICES AND APPEALS

We, therefore, concur with the Oversight Report which recommends that the Customs Service should "Maximize the flow of information to the trade community prior to implementing new policies or procedures which can reasonably be expected to have an impact on trade community operations".

Informed compliance involves statutorily mandated procedures that inform importers of current interpretation and any changes in rulings and regulations, and an adequate internal system that supports an informed compliance policy. Our recommendations with respect to the need for a strong and effective Office of Regulations and Rulings are consistent with the Oversight Recommendations with regard to Finding number 1 concerning the flow of information consonant with informed compliance. In addition, we strongly recommend to the Subcommittee that section 66 of the Tariff Act of 1930 be amended to require advance notice and comment procedure under the Administrative Procedure Act with respect to customs rules and regulations and changes therein, including any decision to limit application of any court decision. In addition, an appeals procedure for any adverse interpretive ruling also should be required. This provisions is found in section 101 of bill to be introduced by Congressmen Pease and Frenzel.

INFORMED COMPLIANCE, PENALTIES, PRIOR DISCLOSURE, DETENTION AND SEIZURES

In the Oversight Subcommittee Report it is observed that, "...the Subcommittee staff met with many Customs officials throughout the country who stated that they acted on the presump-

tion that the trade community will try first to circumvent the law, and only comply if forced to do so."

Definition of Fraud. The Joint Industry Group is convinced that it is this attitude cited above which initiated the publication by the U.S. Customs Service in the Federal Register, on December 20, 1986, a proposed amendment to Appendix B to Part 171, Customs Regulations, that would revise the definition of "fraud" to remove the requirement that the violation be deliberately done with an intent to violate the laws of the United States. On May 12, 1987, the Joint Industry Group informed this Subcommittee that of over sixty comments received by the Customs Service on this proposed rule, all but two strongly opposed this attempt to administratively change the statutory basis of the definition of fraud. Nothing was done with the proposed change until July 31, 1989, when a notice was published make the proposed rule final.

Since subsequent informal appeals to the Customs Service to reverse the July 31, 1989, decision have been to no avail, we request the Subcommittee on Trade to approve an amendment to section 592 of the Tariff Act of 1930, which would set aside this administrative attempt to legislate the definition of fraud in direct conflict with the legislative history of section 592 of the Tariff Act of 1930. This provision would return the degree of culpability and burden of proof relating to violations of Customs laws to the regulatory standards and criteria in effect prior to the Final Rule published by the U.S. Customs Service on July 31, 1989. It is contained in section 103 of proposed Customs Informed Compliance and Automation Act of 1990, to be introduced by Congressmen Pease and Frenzel.

Prior Disclosure. The Joint Industry Group was a strong supporter of the 1978 change in section 592 of the Tariff Act of 1930, the Customs fraud and penalty provision, which provided that importers and other concerned parties who voluntarily reveal violations to Customs prior to, or before they learn of, the commencement of a formal investigation of such violations, would be subject to reduced penalties under section 592. This so-called prior disclosure provision has been considered to be an essential ingredient in an informed compliance approach to Customs laws and regulations. However, it is not clear that the Customs Service recognizes the usefulness of this provision of law. In 1986, Customs revised its regulations to include a presumption that the disclosing party knew of the commencement of a formal investigation if any Customs officer "informed the person concerning the type or circumstances of the disclosed violation."

Finding Number 3. of the Oversight Subcommittee Report states, "Most U.S. Customs Service management decisions are made without supporting data or analysis. The Joint Industry Group is convinced that if the Customs Service had kept a record of the contributions of prior disclosure to successful enforcement it would not have permitted the investigation known as "Operation RAP". This investigation which was initiated by the Customs Service Special Agent's office in Los Angeles involved the sending of letters to more than 1,000 importers advising them that they were under formal investigation, and at the same time seeking to prevent all parties who might conceivably be involved from making prior disclosures. These form letters were sent even though Customs had information in its files indicating that most of the importers could not possibly have violated the law. Moreover, in many cases, Customs did not have evidence or reasonable suspicion that these individuals possibly violated the law. The implicit threat in the letter resulted in an almost universal lack of cooperation with the investigation, since importers had little or no incentive to come forward, and were likely to be penalized if they did.

The Joint Industry Group considered "Operation RAP" to be a very serious, precedential attempt to thwart the use of prior disclosure. Therefore, it recommends that the Subcommittee on

Trade support an amendment to section 592(c)(4) of the Tariff Act of 1930, which would insure that anyone choosing to come forward with a prior disclosure of a possible violation of customs laws or regulations will be entitled to the benefits under the existing program unless the Service has previously had cause to believe otherwise and has reduced the belief to writing by opening an investigation. The change is included in section 104 of the bill being introduced by Congressmen Pease and Frenzel.

Seizure Authority. The Oversight Subcommittee Report states: "One of the most effective enforcement tools available to the U.S. Customs Service is the seizure authority granted under several statutes. Properly applied, this authority can prevent harmful or even deadly cargo from entering the United States. Improperly applied, it can severely injure legitimate commercial businesses engaged in international trade."(page 34).

The seizure authority enacted in 1986, while not as wide-sweeping as that originally sought by the U.S. Customs Service, i.e. authority to effect seizures of merchandise in all instances in which merchandise had been imported "contrary to law", has proven to be too attractive an "enforcement" weapon in a number of Districts. Based on the information collected at the request of the Oversight Subcommittee, Customs reported that there had been too many cases of seized merchandise under the revised section 596(c) in which subsequently it was found that there had been no violation of law, the violation was technical and did not warrant seizure, or the violation was technical, and there was no evidence of intent to violate the law. As a result, Customs changed its policy with regard to section 596(c) seizures. The Subcommittee on Oversight, "is optimistic that abuses under 1595a(c) will now cease." The Joint Industry Group is far less sanguine about the Customs Service's future use of a statute that was amended in a manner that would permit the abuses of seizure authority that did occur. Therefore, we urge the Subcommittee on Trade to support an amendment of this section to except from the seizure authority, seizure of any merchandise subject to such penalty under section 592. Such an amendment is contained in section 102 of the bill being introduced by Congressmen Pease and Frenzel.

Detention. As cited above, Finding Number 2. of the Oversight Subcommittee's Report found that U.S. Customs Service allowed essential commercial services to deteriorate over the past decade. The Joint Industry Group has been greatly concerned that the incidence of delays between the time of merchandise entry and Customs's decision to either accept or reject the entry or to seize the subject merchandise has been increasing. The Oversight Subcommittee went on to observe that, "(A) major reason for the inadequate levels of services provided to the trade community is a limitation on resources devoted to commercial operations." While the Joint Industry Group applauds the recommendation of the Subcommittee on Oversight to improve the level of services in commercial operations, we believe the problems with uneconomic and unwarranted detentions should be addressed statutorily. Therefore, we urge the Subcommittee on Trade to amend section 499 of the Tariff Act of 1930, to define detained merchandise as merchandise which has neither been released nor seized within 5 days after an entry has been filed. The amendment should also establish certain notification requirements, including a requirement of a final determination within 30 days after entry, and would provide for judicial review of such detention. This amendment is included as section 107 of proposed Customs Informed Compliance and Automation Act of 1990 being introduced by Congressmen Pease and Frenzel.

Customs Laboratories. Problems of delay in releasing shipments because of delay in receiving analysis from a Customs laboratory was also cited as a instance in deterioration in essential commercial services. The Joint Industry Group believes that the bottleneck to import entry posed by backlogs at Customs laboratories can be solved by statutorily authorizing the

Customs Service to accredit private laboratories within the United States whose services may be utilized to establish the essential characteristics necessary for the customs processing of imported merchandise. As a corollary, the testing results of such laboratories would be based on the importer's certification with respect to the samples tested. The Joint Industry Group urges that the Subcommittee support such a statutory change to section 499 of the Tariff Act of 1930, as set forth in section 106 of the bill being introduced by Congressmen Pease and Frenzel.

REGULATORY AUDIT AND TRADE OPERATIONS

With informed compliance and a fully automated commercial operation, Customs entry and clearance procedures will rely far less on physical inspection and more on post audit procedures and other means of verification relating to the entry of merchandise. Just as with import specialists, auditors examine the operations of U.S. importers to make certain that they are complying fully with U.S. law. Likewise auditors can and should provide valuable advice to the trade community about compliance issues.

Discussions of regulatory audits among participants in the Joint Industry Group reveal a wide disparity of experiences with Customs audits and auditors. Given the recognized need to automate Customs' commercial operations fully, there is also a need to regularize audit procedures. For example, under section 509 of the Tariff Act of 1930, importers undergoing audit are required to file a request under the Freedom of Information Act in order to obtain their own audit report.

The Joint Industry Group believes that section 509 should be amended to regularize the notification rights of the importer being audited, including the right of a pre-audit and a post audit conference, and the right to a copy of the audit report. Such notification and procedural standards are less stringent than those already observed by all auditors in other Federal agencies under the audit guidelines established by the General Accounting Office. The Joint Industry Group urges that the Subcommittee on Trade support the changes in section 509 of the Tariff Act of 1930, as contained in section 105 of the bill introduced by Congressmen Pease and Frenzel.

NATIONAL CUSTOMS AUTOMATION PROGRAM

With respect to automation, the Oversight Subcommittee concluded that the Automated Commercial System (ACS) has serious flaws. While the approach to automation may be fragmented and segmented, the Joint Industry Group has applauded the energetic efforts of the Customs Service to move to a modern, fully automated, and to the extent possible, paperless commercial operations system.

One of the reason for the disjointed undertakings to automate certain operations is the lack of an appropriate statutory base. For example, although Customs has long considered triangle processing, or remote filing, an essential element of a national automation program, its test of triangle processing was gingerly undertaken because of the concern that the test was appropriately authorized under current law. While the concerns expressed by the Oversight Subcommittee are very real, the Joint Industry Group believes that it is essential that the U.S. Customs Service be provided the statutory authority to move toward a national customs automation system.

The Joint Industry Group believes that there are substantial benefits to be derived from a national automation program, for both the government and for the trade community. Such benefits include paperwork elimination, speedier customs clearances, greater uniformity in the application of customs requirements, and corresponding reductions in administrative costs. Inherent in this approach to automation is an "account-based" concept of

importer transactions, viewing them as part of a process occurring over time, rather than as discrete events.

After much discussion in the Customs Entry Procedures Committee and in several meeting of the Joint Industry Group it was decided that legislation authorizing a national automation program should be based on the following general principles:

- o Automation techniques should not be intrusive on the normal flow of business operations and on the privacy of corporate data banks.
- o The program should be non-discriminatory, and Customs should not use negative reinforcement to compel participation.
- o The national system should be based on options and modules.
- o The program should accomplish more efficient use of resources for both Customs and the importer, and the system should not be weighted in favor of either of these sectors.
- o The program must emphasize training of Customs field personnel and the business community to assure a mutual understanding regarding automation techniques and Customs requirements. This informed compliance approach will contribute to efficiency and effectiveness of Customs enforcement.

In terms of specific features, the Joint Industry Group concluded that the statutory authority for a national automation program should include the following options:

- o Electronic retention of all records in a centralized location for both importers and exporters.
- o Use of electronic signatures in all facets of the import transaction.
- o Periodic entry, "To streamline the United States import entry process by presenting an import activity summary report to the U.S. Customs Service on a periodic basis, in lieu of presenting import entry documentation on an individual shipment basis."

In addition, it was felt that the implementing legislation should also require the U.S.. Customs Service:

- o To test remote filing in a manner that, to the extent feasible, includes all aspects of the import entry process.
- o To implement electronic payment, one-stop quota processing, preapproved release of law-risk shipments, filing of entry data in advance of shipment arrivals, and provide uniform application of customs rulings and regulations.

The Joint Industry Group firmly believes that these are the general and specific principles upon which the national customs automation program should be based. It is these principles that are provided in sections 211 through 236 of the proposed Customs Informed Compliance and Automation Act of 1990. We strongly urge the Subcommittee to support such changes and additions to customs laws. These principles are what guide the operations of customs services in other industrialized countries. To delay any longer the statutorily mandated start on a national customs automation program will only stretch further the Customs Service resources while the Service struggles to keep up with the vast increases in quantity and complexity of United States imports.

THE CUSTOMS SERVICE'S MODERNIZATION PROPOSALS

While the Legislative Task Force of the Joint Industry Group has had the opportunity to discuss with Customs officials a Synopsis of Customs' Modernization proposals, there has been no opportunity to examine the proposals in detail. Therefore, we are not prepared to discuss the legislative changes being recommended by the Customs Service and the Treasury Department at this hearing. We assume that certain of the implementing changes will parallel those discussed above.

I would ask permission, Mr. Chairman, to submit for this hearing record the Joint Industry Group's analysis of the government's proposals, at least to the extent we can develop and submit such an analysis prior to the closing of the hearing record.

Mr. Chairman, the Joint Industry Group again congratulates your Subcommittee and the Subcommittee on Oversight for bringing to the attention of the Congress and to the public's attention the existing shortcomings of the Customs Service's commercial operations. As stated in the Congressional Findings section of proposed Customs Informed Compliance and Automation Act discussed above, and we certainly hope that your Subcommittee will so find, that, "in the present competitive environment of international markets, delays in meeting delivery dates, either outbound or inbound, can adversely affect carefully planned production schedules, sales projections, and pricing strategies, and, therefore, the facilitation of trade must be recognized as a responsibility of the United States Customs Service that is as important as the protection of the revenue and the effective enforcement of the customs laws and regulations."

We believe that the facilitation of trade will in the future best be accomplished by the enactment of the proposed Customs Informed Compliance and Automation Act of 1990, and we strongly urge the Subcommittee on Trade to initiate such action.

Thank you for this opportunity to present the views and recommendations of the Joint Industry Group.

* * * * * * * * * *

ORGANIZATION SUPPORTING THE JOINT INDUSTRY GROUP'S LEGISLATIVE RECOMMENDATIONS

Business Firms

A T & T
Alexanders
Apple Computer, Inc.
Associated Merchandising Corporation
Caterpillar Industries
Data General Corporation
Digital Equipment Corporation
Fujitsu America, Inc.
General Motors Corporation
Intel Government Affairs
International Telephone and Telegraph
International Business Machines Corporation
Mattel, Inc.
Matsushita Electric Corporation
Pagoda Trading Company
Polysar, Inc.
Procter & Gamble
Sprague Electric Company
The 3M Company
UPS Customhouse Brokerage
Warnaco, Inc.
Xerox Corporation

Trade Associations

Air Transport Association
American Association of Exporters and Importers
American Electronic Association
American Paper Institute
Automobile Importers of America
Chemical Manufacturers Association
Computer and Business Equipment Manufacturers Association
Electronic Industries Association
Foreign Trade Association of Southern California
International Hardwood Products Association
International Mass Retail Association
Midwest Importers Trade Association
Motor Vehicle Manufacturers Association
National Association of Foreign Trade Zones
National Association of Photographic Manufacturers
National Retail Federation
National Apparel and Textile Association

Professional Firms

Arthur Andersen and Company
Arthur Cherry Associates
Baker & McKenzie
Barnes Richardson & Colburn
Broker Power, Inc.
Dorsey & Whitney
Freeman Wasserman & Schneider
George R. Tuttle, P.C.
Hogan & Hartson
International Business & Government Counsellors, Inc.
KPMG - Peat Marwick
Lindsay Hart Neil & Weigler
Miller & Steuart
Mudge Rose Gutherie Alexander & Ferdon
Patton Boggs & Blow
Powell Goldstein Frazer & Murphy
Ross and Hardies
Stein Shostak Shostak & O'Hara
Tompkins & Davidson
Washington International Insurance Company

THE JOINT INDUSTRY GROUP

RECOMMENDATIONS ON THE U.S. CUSTOMS SERVICE COMMERCIAL OPERATIONS

THE NEED FOR A STRONG AND EFFICIENT CUSTOMS SERVICE

The Joint Industry Group, a coalition of trade associations and U.S. businesses, has a strong and immediate interest in efficient processing of shipments and entries by the U.S. Customs Service.

In today's competitive business environment, imports and exports play an increasingly important and often strategic role in bottom line performance. Delays in meeting delivery dates, either inbound or outbound, can wreak havoc on carefully planned production schedules, sales projections and pricing strategies.

Despite the parochial concerns such delays create, The Joint Industry Group (JIG) believes the issue of Customs Commercial Operations should not be framed as a choice between moving commerce and enforcing the law. Instead, we believe the issue is more correctly one of facilitating compliance with the law.

Generally, an effective compliance program has three elements:

First, importers and exporters need to know and be able to find out what the laws are, and if necessary to obtain advice when there are questions about the treatment of new articles of commerce.

Second, importers and exporters need some measure of certainty that the law and interpretations of it will not be changed suddenly without due notice and opportunity for comment.

Third, importers and exporters expect the Customs Service to facilitate international trade, while at the same time ensuring that the laws are adequately enforced.

In recent years, many in the business community have grown concerned about the trend in Customs to focus on the third element of compliance to the exclusion of the first two. Catching problems at the nation's ports is certainly good for headlines, but it is only part of Customs' responsibility.

We believe that improving the ability of importers and exporters to comply fully with the law – before shipments reach the ports – will improve compliance rates, and make it much easier to detect those who willfully commit fraud.

In the following papers, The Joint Industry Group recommends specific proposals that will improve the first two elements of informed compliance, make certain that customs penalties are reasonable and in proportion to offenses, and improve the ability of the Customs Service to enforce customs laws and regulations efficiently and effectively.

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ORGANIZATIONS SUPPORTING THE JOINT INDUSTRY GROUP'S LEGISLATIVE RECOMMENDATIONS

Business Firms of the Joint Industry Group

A T & T
Alexanders
American President Lines, Ltd.
Associated Merchandising Corporation
Catepillar Industries
Control Data
Data General Corporation
Digital Equipment Corporation
Fujitsu America, Inc.
General Motors Corporation
International Telephone & Telegraph
International Business Machines Corporation
Mattel, Inc.
Matsushita Electric Corporation
Pagoda Trading Company
Polysar, Inc.
Procter & Gamble
Sprague Electric Company
The 3M Company
UPS Customs House Brokerage
Warnaco, Inc.
Xerox Corporation

Trade Associations of the Joint Industry Group

Air Transport Association
American Association of Exporters and Importers
American Electronics Association
American Paper Institute
American Retail Federation
American Watch Association
Automobile Importers of America
Chemical Manufacturers Association
Computer and Business Equipment Manufacturers Association
Electronic Industries Association
Foreign Trade Association of Southern California
INDA (Association of Nonwoven Fabric Industries)
International Harwood Products Association
International Footwear Association

Trade Associations (cont.)

International Mass Retail Association
Midwest Importers Trade Association
Motor Vehicle Manufacturers Association
National Association of Foreign Trade Zones
National Association of Photographic Manufacturers
National Retail Merchants Association
Northwest Apparel and Textile Association
Semiconductor Equipment and Materials International
United Shipowners of America

Professional Firms of the Joint Industry Group

Arthur Andersen and Company
Arthur Cherry Associates
Baker & McKenzie
Barnes Richardson & Colburn
Broker Power, Inc.
Dorsey & Whitney
Freeman Wasserman & Schneider
George R. Tuttle, P.C.
Hogan & Hartson
International Government & Business Counsellors, Inc.
JCLD Consultancy
Lindsay Hart Neil & Weigler
Miller & Steuart
Dennis Adelson, Esq.
Mudge Rose Gutherie Alexander & Ferdon
Patton Boggs & Blow
Peat Marwick
Powell Goldstein Frazer & Murphy
Ross & Hardies
Stein Shostak Shostak & O'Hara
Tompkins & Davidson
Washington International Insurance Company

January 5, 1990

RECOMMENDATIONS OF THE JOINT INDUSTRY GROUP

Introduction: The Need for a Strong and Efficient Customs Service
Organizations Supporting JIG Legislative Recommendations

I. Leadership and Resources
- Office of the Commissioner
- Customs User Fees

II. Informed Compliance Programs
- The Need for a Strong Office of Regulations and Rulings
- Trade Operations: Import Specialists, Regulatory Audit & Testing Laboratories

III. Entry and Penalties Issues
- Customs Automation Programs
- Unwarranted Use of Seizure Authority
- by the Customs Service
- The Need for a Definition of Fraud
- Prior Disclosure
- Private Right of Action for Customs Violations
- "Detention" of Merchandise

August, 1989

I. LEADERSHIP AND RESOURCES

OFFICE OF THE COMMISSIONER

The Joint Industry Group supports Congressional efforts to convert the post of Commissioner of the U.S. Customs Service to one requiring confirmation by the Senate.

The post of Commissioner is presently a Senior Executive Service (SES) position. Appointment is made by the Secretary of the Treasury, whose decision requires no further review. A rationale for this has been the notion that the position's SES status has separated the selection process from other purely political appointments and has increased the likelihood that a career Customs or trade professional would be selected.

Reasons why Senate confirmation should be required:

- o Positions comparable to Commissioner of U.S. Customs -- such as the Commissioner of the Internal Revenue Service -- are subject to confirmation by the Senate.
- o The selection process has, as a practical matter, been identical to that of all political appointees; only approval by the Senate is not required.
- o A position of this importance will always attract the highest level of Administration attention, just as does the head of the FBI or the Commissioner of the Internal Revenue Service. Given the importance of the position, the selection process should not be divorced from an open political process.
- o Confirmation, even though conducted by one body, has the effect of making the position more responsive to the entire Congress. Presently, the Commissioner's "political base" can be limited to a narrow though intense segment within Congress. That base must be expanded. With this, accountability also expands to a broader element.
- o Senate confirmation can have the effect of ensuring that consideration be given to selection of an individual with a broad background in international trade.
- o Confirmation makes the process public and guarantees that a Commissioner's enforcement views can be fully scrutinized. This can serve to ensure a closer, literal adherence to the intent of Congress.
- o The supervisory relationship with the assistant secretary level at Treasury would not be affected by a requirement of Senate confirmation. Organizations within the Department of the Treasury and lines of reporting would be unaffected.

CUSTOMS USER FEES

The Joint Industry Group opposes the concept and the imposition of customs user fees for those customs services which bestow no special benefit on importers.

In addition, the absence of any factual basis for assessing customs user fees has made it difficult for the Congress to realistically conform user fees to the requirements of the General Agreement on Tariffs and Trade (GATT). None of the various schedules of customs user fees put forth by the U.S. Customs Service and the Treasury Department, has been supported by an analysis demonstrating that the proposed fees bear some relationship to the costs, or even the value, of the particular services being performed.

Moreover, the proposals have included broad authority for the Secretary of the Treasury to set customs user fees annually to meet the budgetary costs assigned to the commercial operations of the Customs service. And yet, in the absence of an analysis of the costs of the services provided as a frame of reference, such a delegation of authority is difficult to justify.

Consequently, JIG's general opposition to customs user fees notwithstanding, the Joint Industry Group recommends that Congress request the General Accounting Office to conduct a study of the costs of the various services provided by the U.S. Customs Service.

- o The recommended GAO study would provide the business community and the Congress with a basis for analyzing the impact of such fees.
- o The study would enable the development of a specific recommendation on the form of such fees.
- o The study would provide justification for delegation of authority to the Secretary of Treasury to set fees on an annual basis.
- o **Without such an analysis,** the United States simply cannot demonstrate to our trading partners that the user fee is consistent with GATT.

II. INFORMED COMPLIANCE PROGRAMS

THE NEED FOR A STRONG AND EFFECTIVE OFFICE OF REGULATIONS AND RULINGS

The Joint Industry Group is in favor of a strong and effective Office of Regulations and Rulings (OR&R) rendering correct, timely and impartial interpretations of the Customs laws with due consideration to both compliance objectives and the needs of law enforcement.

BACKGROUND

Over the last ten years, OR&R has shifted away from efforts to help importers and expoerts comply with the law, toward a more adversarial posture.

Through most of the 1970's, the trade community could contact OR&R, formally or informally, to discuss problems and obtain guidance on legal matters under the responsibility of that office. The informal advice and formal decisions rendered by OR&R provided much needed predictability and understanding regarding the legal consequences of an import transaction, allowing informed and appropriate business decisions to be made.

During the 1980's, however, OR&R moved away from its traditional function of providing neutral interpretations of the law to one of supporting policy decisions of the Commissioner of Customs. As a result of this change:

- It is now far more difficult to meet with OR&R attorneys to resolve problems, and the OR&R decision-making process is inordinately long and cumbersome;
- There is an increasing likelihood that OR&R will modify its own decisions or limit the application of a court decision, to meet non-legal objectives imposed upon it from within the Customs Service or by another government agency; and
- There is a distinct reluctance on the part of OR&R to contact import specialists and other Customs Service personnel in the ports to ensure that the actions taken in the ports are consistent with the law.

This shift in philosophy has increased burdens on the courts to resolve problems, increased costs of doing business for the trade community and, ultimately, increased costs to consumers.

RECOMMENDATIONS

The Joint Industry Group recommends the following actions to achieve a strong and effective OR&R.

Congressional Action

- **Elevate OR&R (as it once was) to the Assistant Commissioner level.** As the only legal office organizationally part of the Customs Service, OR&R must be able to function independently of, and as a co-equal with, other major offices within the Customs Service which have non-legal functions.
- **Increase staffing levels, to at least the mid-1970's level.** Although the personnel shortage has been most critical in the commercial rulings area, staffing increases are necessary throughout OR&R.
- **Provide for full public notice, and comment procedures where appropriate, prior to any decision to modify or revoke an OR&R decision or to limit the application of a court decision.**
- **Establish a mechanism for formal administrative appeal of all prospective ruling decisions issued by OR&R,** to reduce the burden on the courts and relieve importers of the excessive costs of litigation.

Management Proposals

- Steamline procedures regarding the issuance and implementation of OR&R decisions by, for example,
  - -- Increasing the number of divisions, branches and signing officials within OR&R, to correct the present situation in which too many cases addressing a broad spectrum of issues are sent to a single official for final approval.
  - -- Establishing a more efficient and informal line of communication between OR&R and the ports, to provide for more effective implementation of OR&R decisions in the ports and to facilitate resolution of problems between the Customs Service and importers without resort to the lengthy protest procedure.

CUSTOMS TRADE OPERATIONS: IMPORT SPECIALISTS, REGULATORY AUDIT AND TESTING LABORATORIES

Trade Operations -- the day-to-day activities of Import Specialists, Auditors and Customs Laboratories -- are critical elements of Customs' informed compliance program.

Import Specialists and Commodity Specialty Teams (CSTs) have the important and often complex job of insuring that the information on the import documentation is accurate. To do this, they must learn about commodities and businesses. Further, they rely on testing of products to assure that importers fully comply with the law. Consequently, Import Specialists are critical sources of information to importers about compliance issues.

Similarly, Customs Auditors examine the operations of U.S. importers to make certain that they are complying fully with U.S. Law. Auditors can, and should, provide valuable advice to business about compliance issues.

The function of Inspectors is very different from Auditors and Import Specialists. Inspectors are responsible for making certain that shipments correspond to their descriptions on import documents and if they don't, or are illegal, in denying entry. An inspector only looks at importations once they reach the port of entry.

RECOMMENDATIONS

The activities of Import Specialists and Auditors are valuable to the business community. The Joint Industry Group believes that these activities should be expanded and improved in the following ways.

Import Specialists

Congressional Action

- **Appropriate additional resources for the hiring and training of Import Specialists.**

Action by the Customs Service

- **Provide that every Commodity Speciality Team (CST) have at least one Senior Import Specialist (at the GS-11 level) to back up the Team Leader.** The principal responsibility of the Senior Import Specialist should be public liaison with the business community. He or she should to routinely collect information about commodities and markets needed by the CST from importers, and should be available to provide advice to importers.
- **Provide that the number of Senior Import Specialists on CSTs responsible for specially limited commodities be directly proportional to the volume of entries of those commodities at any particular port.** Commodities under specific limitations imposed by law or an agency of the U.S. Government or limited by voluntary restraints (textiles, steel, sugar, etc.) pose exceptional difficulties for the importing community and the Customs Service.
- **Provide that every District have a public telephone line staffed by Import Specialists to handle routine inquiries not related to any specific commodity.**
- **Require Import Specialists to communicate regularly with the professional staff of the Office of Regulations and Rulings.**

Regulatory Audit

Congressional Action

- **Require Customs Auditors to provide importers with an estimate of the time-frame for an audit at the time of the initial audit conference.** The Customs Service should be allowed to extend the time-frame for the audit by writing the importer.
- **Allow the importer to petition the Regional Commissioner, who will schedule a conference within 30 days, if the end date for an audit passes without a closing conference.**
- **Require Customs to complete all audit reports within 90 days after the closing conference with the importer.**
- **Require Customs to send a copy of the audit report to the importer no later than 30 days after the report is completed.**

Customs Laboratories

Congressional Action

- **Provide additional funding for Customs laboratories.**
- **Allow for the certification of private laboratories in the United States.**
- **Require Customs to accept the testing results from these laboratories so long as importers can certify that the samples tested were from the instant shipment.**

III. ENTRY AND PENALTIES ISSUES

AUTOMAT.LEG

NATIONAL CUSTOMS AUTOMATION PROGRAM

The Joint Industry Group, in principle, supports legislation which by statute authorizes 1) implementation of a national Customs automation program and 2) appropriations which support its implementation. Such a program carries the potential for streamlining trade on a revolutionary scale for both government and private sector alike.

Substantial mutual benefits are to be derived from a national automation program, including paperwork elimination, speedier customs clearances, greater uniformity in the application of customs requirements, and corresponding reductions in administrative costs. Inherent in this approach to automation is an "account-based" concept of importer transaction, viewing them as part of a process occurring over time, rather than as discrete events.

General Principles

Legislation for a national automation program should provide for implementation of the program in a manner which:

- assures that automation techniques are non-intrusive as possible with respect to the normal flow of business operations and the privacy of corporate data banks.
- is non-discriminatory. Non-users should not be penalized for their lack of participation in the program. In particular, Customs should not use negative reinforcement to compel parties to use automation.
- is based on options and modules. Users should be able to select the modules they wish to use, based on a menu of options.
- accomplishes more efficient use of resources for both Customs and importers. The program should not be weighted in favor of either of these sectors.
- emphasizes training of Customs field personnel and the business community to assure that information and guidelines regarding automation techniques are mutually understood. A program that provides importers with necessary training before the fact, constitutes sound management. Moreover, this approach encourages compliance and improves the efficiency and effectiveness of Customs enforcement.

SPECIFIC FEATURES

Legislation for a national automation program should provide authority for the following options:

- o Electronic retention of all records in a centralized location for both importers and brokers.
- o Use of electronic signatures in all facets of import transactions (release, entry summary, affidavits, etc.).
- o Periodic Entry, as provided below:

  "To streamline the United States import entry process by presenting an import activity summary report to the U.S. Customs Service on a periodic basis, in lieu of presenting import entry documentation on an individual shipment basis."

- o Periodic payment of duties.

The legislation should also require U.S. Customs to:

- o Test remote filing in a manner that, to the extent feasible, includes all aspects of the import entry process.
- o implement electronic payment, one-stop quota processing, preapproved release of low-risk shipments, filing of entry data in advance of shipment arrival, and uniform application of customs rulings and regulations.

UNWARRANTED USE OF SEIZURE AUTHORITY BY THE U.S. CUSTOMS SERVICE

The Joint Industry Group opposes the use by the Customs Service of Section 596(c) of the Tariff Act of 1930, as amended, 19 U.S.C. 1595a(c), as a source for virtually unlimited seizure authority for commercial violations, and as a substitute for the more limited and appropriate commercial seizure measures set forth in 19 U.S.C. 1592.

BACKGROUND

In commercial transactions, seizure of imported goods has always been the ultimate enforcement measure. The loss of the goods either puts the transaction on hold in the case of temporary seizure, or more likely in current business patterns, can result in the total loss of the value of the transaction. Legitimate business concerns dependent upon an uninterrupted flow of goods cannot afford practices which place them in jeopardy of being charged with customs law violations serious enough to warran' seizure of goods.

In 1986, the U.S. Customs Service sought authority to effect seizures of merchandise in all instances in which merchandise had been imported "contrary to law." At the time the Congress first considered this measure, it was sympathetic to the Custom Service's contentions that drug imports, which were the target of efforts by the Congress to mount a full-scale war, were clearly merchandise falling within that definition. The business community, led by the efforts of the Joint Industry Group, pointed out to the Congress that there were numerous instances in which commercial imports could be considered to be "contrary to law" if improperly classified or valued, but which were not appropriate for seizure.

In recognition of these concerns, Congress revised proposed section 596(c) of the Tariff Act of 1930, as amended, 19 U.S.C. 1595a(c), to provide that seizure authority should extend to merchandise "imported contrary to law (**other than in violation of section 1592**)." It was understood that commercial imports, which were improperly classified or valued or which were otherwise imported by the commercial sector in violation of law, other than the drug laws, would continue to be subject to compliance action only under section 592 of the Tariff Act of 1930, as amended (a provision the Congress had amended in 1978 to provide for commercial seizures only in very limited instances).

The Joint Industry Group has documented instances in which the Customs Service has initially sought to impose penalties under section 592 only to change direction and impose them under section 596 of the Act, apparently to be in position to effect seizure of the merchandise in issue. This has resulted in importers being subjected to harassment as in the past when Customs seized property and then used the seizure as a bargaining chip in the waiver of importers rights. The effect of Customs' misuse of Section 596(c) has been to eviscerate the careful and detailed 1978 reforms by Congress to balance importers' rights with the Customs Service's obligation to enforce commercial compliance.

RECOMMENDATION

The Joint Industry Group recommends that section 596 of the Act be amended to reflect the fact that the parenthetical expression stands for the proposition its framers intended *ab initio;* namely, in purely commercial transactions not involving controlled substances, section 592 of the Act is the operative statute. As such, seizure will only be permitted if the conditions described in section 592 of the Act are met.

THE NEED FOR A DEFINITION OF FRAUD

In 1978, Congress amended Section of 592 of the Tariff Act of 1930 (Attachment A) to reform civil penalties for customs law violations with different maximum penalties depending on the level of culpability, as follows:

- o A violation involving "fraud" is punishable by a civil penalty of up to 100 percent of the domestic value of the merchandise.
- o A violation involving "gross negligence" is punishable by a civil penalty not to exceed four times the duties of which the United States government is deprived, or in cases where the violation did not result in a loss of revenue, 40 percent of the merchandise's dutiable value.
- o A violation involving "negligence" is punishable by a civil penalty not to exceed two times the duties of which the United States government is deprived, or in cases where the violation did not result in a loss of revenue, 20 percent of the merchandise's dutiable value.

The terms "fraud", "gross negligence" and "negligence" are defined in the Customs Regulations (Attachment B). Those definitions are consistent with the way the terms have been interpreted by Customs since at least 1974. Congress was aware of these definitions when it adopted those terms in the reform of Section 592 in 1978.

The U.S. Customs Service has published a proposed amendment to its regulations that would revise the definition of "fraud" to remove the requirement that the violations be deliberately done with an intent to violate the laws of the United States. This would be a radical departure from long-continued practice, and would be inconsistent with the usual definition of fraud in the application of Federal statutes. **In response to this proposal, the House Ways and Means Committee included language (Attachment C) in its report on HR 3, The Omnibus Trade and Competitiveness Act expressing its disagreement with this redefinition.**

RECOMMENDATION

The Joint Industry Group likewise disagrees with this proposed change, and recommends that Congress codify the definitions of the levels of culpability now contained in the Customs Regulations. Such action would ensure that realistic distinctions between the levels of culpability are maintained, and that only deliberate violations of the law are subjected to the most severe penalties.

ATTACHMENT A

§ 1592. Penalties for fraud, gross negligence, and negligence

(a) Prohibition.—

(1) General rule.—Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—

(i) any document, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception.—Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

(b) Procedures.—

(1) Pre-penalty notice.—

(A) In general.—If the appropriate customs officer has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, he shall issue to the person concerned a written notice of his intention to issue a claim for a monetary penalty. Such notice shall—

(i) describe the merchandise;

(ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction;

(iii) specify all laws and regulations allegedly violated;

(iv) disclose all the material facts which establish the alleged violation;

(v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence;

(vi) state the estimated loss of lawful duties, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and

(vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

(B) Exceptions.—The preceding subparagraph shall not apply if—

(i) the importation with respect to which the violation of subsection (a) of this section occurs is noncommercial in nature, or

(ii) the amount of the penalty in the penalty claim issued under paragraph (2) is $1,000 or less.

(2) Penalty claim.—After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (1), the appropriate customs officer shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. If such officer determines that there was no violation, he shall promptly issue a written statement of the determination to the person to whom the notice was sent. If such officer determines that there was a violation, he shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 1618 of this title to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under such section 1618, the appropriate customs officer shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

(c) Maximum penalties.—

(1) Fraud.—A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.

(2) Gross negligence.—A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) four times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence.—A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed—

(A) the lesser of—

(i) the domestic value of the merchandise, or

(ii) two times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

(4) Prior disclosure.—If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, with respect to such violation, merchandise shall not be seized and any monetary penalty to be assessed under subsection (c) of this section shall not exceed—

(A) if the violation resulted from fraud—

(i) an amount equal to 100 percent of the lawful duties of which the United States is or may be deprived, so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within thirty days, or such longer period as the appropriate customs officer may provide, after notice by the appropriate customs officer of his calculation of such unpaid amount, or

(ii) if such violation did not affect the assessment of duties, 10 percent of the dutiable value; or

(B) if such violation resulted from negligence or gross negligence, the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of Title 26) on the amount of lawful duties of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within 30 days, or such longer period as the appropriate customs officer may provide, after notice by the appropriate customs officer of his calculation of such unpaid amount.

The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

(5) Seizure.—If the Secretary has reasonable cause to believe that a person has violated the provisions of subsection (a) of this section and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law. Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c) of this section.

(d) Deprivation of lawful duties.—Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.

(e) District court proceedings.—Notwithstanding any other provision of law, in any proceeding in a United States district court commenced by the United States pursuant to section 1604 of this title for the recovery of any monetary penalty claimed under this section—

see next page

(1) all issues, including the amount of the penalty, shall be tried de novo;

(2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence;

(3) if the monetary penalty is based on gross negligence, the United States shall have the burden of proof to establish all the elements of the alleged violation; and

(4) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence.

June 17, 1930, c. 497, Title IV, § 592, 46 Stat. 750; Aug. 5, 1935, c. 438, Title III, § 304(b), 49 Stat. 527; Oct. 3, 1978, Pub.L. 95-410, Title I, § 110(a), 92 Stat. 893.

Historical Note

Prior Provisions. Provisions similar to those of this section were contained in Act Oct. 3, 1913, c. 16, § 111, II, 38 Stat. 183, which was superseded by Act Sept. 21, 1922, c. 356, Title IV, § 592, 42 Stat. 982, and was repealed by section 643 thereof. Section 592 of the 1922 Act was superseded by section 592 of the Tariff Act of 1930, comprising this section, and was repealed by section 651(a)(1) of the 1930 Act.

The provisions of section III, II, of the Act of 1913, were substituted for provisions of the same nature made by the Customs Administrative Act of June 10, 1890, c. 407, §§ 6, 9, 26 Stat. 134, 135, amended and reenacted by Payne-Aldrich Tariff Act of Aug. 5, 1909, c. 6, § 28, 36 Stat. 95, 97.

Those provisions superseded similar provisions made by R.S. § 2864, as amended by Act Feb. 18, 1875, c. 80, 18 Stat. 319, which was repealed by Act Sept. 21, 1922, c. 356, Title IV, § 642, 42 Stat. 989.

R.S. § 2839 provided for forfeiture of merchandise entered, but not invoiced according to the actual cost at the place of exportation, with the design to evade payment of duty. It was repealed by the Customs Administrative Act of June 10, 1890, c. 407, § 29, 26 Stat. 141, and provisions of a similar nature were made by section 9 of that Act, amended by the Payne-Aldrich Tariff Act of Aug. 5, 1909, c. 6, § 28, 36 Stat. 97, and further amended by the Underwood Tariff Act of Oct. 3, 1913, c. 16, § 111, II, 38 Stat. 183.

Act June 22, 1874, c. 391, § 16, 18 Stat. 189, requiring special findings as to fraud in actions, etc., to enforce forfeitures, etc., was repealed by Customs Administrative Act of June 10, 1890, c. 407, § 29, 26 Stat. 141.

1978 Amendment. Pub.L. 95-410 substituted subsecs. (a) to (e) relating to penalties for fraud, gross negligence, and negligence for prior provisions which: provided for forfeiture of merchandise, or recovery of value thereof, where entry or attempted entry of the merchandise was made using fraudulent or false invoice, declaration, affidavit, letter, paper, or false statement, written or verbal, false

Prior Provisions. A prior section 1590, Act June 17, 1930, c. 497, Title IV, § 590, 46 Stat. 750, related to false drawback claims was repealed by Act June 25, 1948, c. 645, § 21, 62 Stat. 862, and is now covered by section 550 of Title 18, Crimes and Criminal Procedure.

Legislative History. For legislative history and purpose of Pub.L. 99-570, see 1986 U.S.Code Cong. and Adm.News, p. 5393.

§ 1592. Penalties for fraud, gross negligence, and negligence

[See main volume for text of (a) to (d)]

(e) Court of International Trade proceedings

Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—

[See main volume for text of (1) to (4)]

(As amended Oct. 10, 1980, Pub.L. 96-417, Title VI, § 609, 94 Stat. 1746.)

1980 Amendment. Subsec. (e). Pub.L. 96-417 substituted in heading "Court of International Trade" for "District court" and in text "proceeding commenced by the United States in the Court of International Trade" for "proceeding in a United States district court commenced by the United States pursuant to section 1604 of this title".

Effective Date of 1980 Amendment. Amendment of subsec. (e) by Pub.L. 96-417 applicable with respect to civil actions commenced on or after the 90th day after Nov. 1, 1980, see section 701(c)(2) of Pub.L. 96-417, as amended, set out as a note under section 251 of Title 28, Judiciary and Judicial Procedure.

Effective Date of 1978 Amendment. Section 110(f) of Pub.L. 95-410 provided that:

"(1)(A) Except as provided in subparagraphs (B) and (C), subsections (a), (b), and (c) (other than new subsection (e) of section 592 of the Tariff Act of 1930 as added by subsection (a)) [subsecs. (a), (b), and (c) of section 110 of Pub.L. 95-410, not including (e) of this section] shall be effective with respect to proceedings commenced after the 89th day after the date of enactment of this Act [Oct. 3, 1978].

[See main volume for text of (B), (C); (2)]

Legislative History. For legislative history and purpose of Pub.L. 96-417, see 1980 U.S. Code Cong. and Adm. News, p. 3729.

Code of Federal Regulations

False or fraudulent statement made to Customs officer, see 19 CFR 148.19.

Fines, penalties and forfeitures, generally, see 19 CFR 171.0 et seq.

Notice of fine, penalty or forfeiture, see 19 CFR 162.31.

Voluntary disclosure of violation as affecting fine, penalty or forfeiture, see 19 CFR 171.1.

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½. Retroactive effect

Under transition rule of Customs Procedural Reform and Simplification Act of 1978, § 110(f)(1), set out as a note under this section, law existing prior to Oct. 3, 1978 applied to administrative proceedings begun before effective date of Reform Act, so that United States, in order to recover civil penalties under this section from importer for having allegedly made 293 entries using documents containing false statements, had to show probable cause that importer was without reasonable cause to believe truth of its statements, with burden then shifting to importer to prove there was no violation; importer's degree of culpability need not be set forth. U.S. v. F.A.G. Bearings, Ltd., 1984, 598 F.Supp. 401, 8 C.I.T. 294.

Because prepenalty notice in United States' action alleging that importer made false statements in connection with importation of pearl essence was issued prior to effective date of 1978 amendment of this section, action was governed by preamendment provisions of this section, with exception that action was subject to amended judicial review provision. U.S. v. R.I.T.A. Organics, Inc., D.C.Ill.1980, 487 F.Supp. 75.

1. Construction

Phrase, "without reasonable cause to believe the truth of such statement," in statute prohibiting importation of merchandise by means of false statements and false or fraudulent practices or appliances, modifies only the last previous antecedent phrase, viz., "any false statement in any declaration under the provisions of section 1485 of this title (relating to declaration on entry)," and does not blanket the statute in its entirety thereby allowing absence of "reasonable cause to believe," i.e., negligence, to serve as basis for liability under the statute. U.S. v. Van-Fuel, Inc., C.A.1 (Mass.) 1985, 758 F.2d 741.

Detailed requirements of this section relating to forfeiture of goods cannot be defeated by utilization of the general federal statutory provision of section 2461 of Title 28 authorizing the use of

Generalized System of Preferences (see §§ 10.171-10.178, Customs Regulations) or Schedule 8, TSUS), the following rules apply:

1. *Mitigated Penalty for First Offense.*

a. For violations which are first offense, and involve articles entitled to the benefit of GSP or Schedule 8, TSUS, the liabilities shall be remitted upon payment of One Times the Duty which would have been due if the articles had not been entitled to the benefit.

b. For violations which are first offense, and involve absolutely duty-free articles, the liabilities shall be remitted upon payment of Between One and Five Percent of the Domestic Value, but not less than $50 (or the domestic value, whichever is less) nor more than $1,000.

2. *Mitigating Factors.* When mitigating factors such as those outlined above are present, the deciding officer may, in his discretion, reduce the mitigated amount to a lower figure.

3. *Aggravating Factors.*

a. When aggravating factors such as those outlined above are present, the deciding officer may, in his discretion, remit the liabilities for conditionally free articles upon the payment of Between One and Two Times the Duty (but not less than $100), or the domestic value, whichever is lower.

b. For absolutely free articles, the deciding officer may remit the liabilities upon payment of Between Five and Ten Percent of the Domestic Value, but not less than $100.

4. *Commercial Merchandise.*

The fact that undeclared duty-free articles are imported for commercial purposes may be considered an aggravating factor under section II.3. of these guidelines.

III. *Other Applicable Rules.*

1. These guidelines provide a framework and procedure by which violations of 19 U.S.C. 1497 are to be analyzed. They are not mandatory in the sense that they must be absolutely applied. Customs officers varying from these guidelines must provide reasons for doing so in the case record.

2. Customs officers shall document mitigating and aggravating factors found in each case in the case file. There must be a basis shown for mitigated amounts.

3. It is intended that mitigating and aggravating factors shall be considered together and used to offset each other where appropriate.

4. The rate of duty to be used in calculating the mitigated penalty shall be the appropriate rate from Schedules 1-7, TSUS, and not the flat rate from Schedule 8, TSUS.

5. "Duty" means Customs duties and any internal revenue taxes which would have attached upon importation (see section 101.1(i), Customs Regulations). Therefore, multiples will also be applied to internal revenue taxes which would have been due.

6. Customs officers may, within their discretion, consider other factors not here delineated as aggravating or mitigating and apply the guidelines accordingly. These additional factors must also be documented in the case file.

7. These guidelines are not authority for admitting into the commerce of the United States articles which are conditionally or absolutely prohibited from entry.

8. The presence of one or more extraordinary aggravating factors, includng but not limited to those set forth in section I.6. of these guidelines, may within the discretion of the deciding officer be a basis for denial of relief.

9. If the violator is being prosecuted criminally, the civil (19 U.S.C. 1497) liability generally is administratively settled only after completion of the prosecution or with the express approval of the appropriate U.S. attorney. Criminal prosecution of the violator, however, is insufficient grounds to delay indefinitely determination of the civil liability. The district director or area director should contact the Regional Counsel of Customs to determine the best course of action to follow with respect to the civil liability. Regional Counsel will consult with the U.S. attorney and the Miscellaneous Penalties Branch at Customs Headquarters. Because of time delay problems, all *seizures* involving criminal prosecutions must be promptly coordinated in this manner, and consideration should be given to immediate referral of the forfeiture action to the U.S. attorney for the institution of a judicial proceeding.

[T.D. 83-145, 48 FR 30100, June 30, 1983]

Appendix B to Part 171—Customs Regulations, Revised Penalty Guidelines, 19 U.S.C. 1592

A monetary penalty incurred under section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592; hereinafter referred to as section 592) may be remitted or mitigated under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), if it is determined that there exist such mitigating circumstances as to justify remission or mitigation. The guidelines below will be used by the Customs Service in arriving at a just and reasonable assessment and disposition of liabilities arising under section 592 within the stated limitations. It is intended that these guidelines shall be applied by Customs officers in pre-penalty proceedings and in determining the monetary penalty assessed in the penalty notice. The assessed or mitigated penalty amount determined in accordance with these guidelines does not limit

ATTACHMENT B

the penalty amount which the Government may seek in bringing a civil enforcement action pursuant to 19 U.S.C. 1592(e).

(A) Violations of Section 592; Materiality

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, a violation of section 592 occurs when a person, through fraud, gross negligence, or negligence, enters, introduces, or attempts to enter or introduce any merchandise into the commerce of the United States by means of any document, written or oral statement, or act which is material and false, or any omission which is material; or when a person aids or abets any other person in the entry, introduction, or attempted entry or introduction of merchandise by such means. A document, statement, act, or omission is material if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty, or if it tends to conceal an unfair trade practice under the antidumping, countervailing duty or a similar statute, or an unfair act involving patent or copyright infringement. There is no violation if the falsity or omission is due solely to clerical error or mistake of fact, unless the error or mistake is part of a pattern of negligent conduct.

(B) Degrees of Culpability

There are three degrees of culpability under section 592: negligence, gross negligence, and fraud.

(1) *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation is determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

(2) *Gross Negligence.* A violation is determined to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference or disregard for the offender's obligations under the statute, but without intent to defraud the revenue or violate the laws of the United States.

(3) *Fraud.* A violation is determined to be fraudulent if it results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence.

(C) Assessment of Penalties

(1) *Issuance of Pre-Penalty Notice.* (a) As provided in § 162.77, Customs Regulations (19 CFR 162.77), if the district director has reasonable cause to believe that a violation of section 592 has occurred and determines that further proceedings are warranted, he shall issue to each person concerned a notice of his intent to issue a claim for a monetary penalty. In issuing such pre-penalty notice, the district director shall make a tentative determination of the degree of culpability and the amount of the proposed claim. A pre-penalty notice is not required if the violation involves a non-commercial importation or if the proposed claim does not exceed $1,000.

(b) If the violation is determined to be the result of fraud, the proposed claim shall be equal to the domestic value of the merchandise. In cases involving gross negligence and negligence, in determining the amount of the proposed claim, the district director shall take into account the gravity of the offense, the amount of loss of revenue, the extent of wrongdoing, mitigating, aggravating and extraordinary factors, and other factors bearing upon the seriousness of the violation, but in no case shall the assessed penalty exceed the statutory ceilings prescribed in section 592. In cases involving gross negligence and negligence, penalties equivalent to the ceilings stated in paragraph (D) regarding disposition of cases may be appropriate in cases involving serious violations, e.g., violations involving a high loss of revenue and quota evasions. To be serious, a violation need not result in a loss of revenue. The violation may be serious because it affects the admissibility of merchandise or the enforcement of other laws, as in the case of quota evasions, false statements to conceal the dumping of merchandise, or violations of exclusionary orders of the International Trade Commission.

(c) Violations where the loss of revenue is nonexistent or minimal and which have an insignificant impact on enforcement of the laws of the United States may justify a proposed penalty in a fixed amount not related to the value of merchandise, but an amount believed sufficient to have a deterrent effect, i.e., violations involving the subsequent sale of merchandise or vehicles entered for personal use; violations involving failure to comply with declaration or entry requirements which do not change the admissibility or entry status of merchandise, its appraised value or classification; violations involving the illegal diversion to domestic use of instruments of international traffic; and local point-to-point traffic viola-

ATTACHMENT C

From Report of the Ways and Means , U.S. House of Representatives, to accompany H.R. 3, Trade and International Economic Policy Reform Act of 1987, 100th Congress, 1st Session, Report 100-40, part 1, April 6th, 1987.

of the section is to ensure uniform, reasonable, and equitable decisions by the Secretary with regard to bonds.

Section 872. Scofflaw for Multiple Customs Law Offenders

Present law

Under current law, the penalties applicable to persons who violate our customs laws in importing merchandise are determined without regard to whether the party has previously been found in violation of such laws.

Explanation of provision

Section 872 directs the Secretary of the Treasury to issue an order prohibiting any person, who over a 7-year period has either been convicted of, or assessed a civil penalty for, 3 separate violations of one or more customs laws finally determined to involve fraud or criminal culpability, from importing or engaging others to import any goods or services into the United States. The prohibition on importing would remain in effect for such multiple customs law offender for a 3-year period beginning on the 60th day after the date on which the order is issued. Anyone who violates or knowingly aids or abets the violation of such an exclusion order would be subject to a fine of not more than $250,000 or imprisonment for not more than 10 years or both.

As amended by the Committee, this provision would no longer apply to violations involving gross negligence. This change reflects the Committee's concern that this provision not be used to penalize inadvertent violations. The provision would now only apply to violations involving fraud or criminal culpability, both of which would require willful intent to defraud the government.

In this regard, it is the Committee's understanding that in administering this provision, the definition of "fraud" will be as presently contained in Para.(B) (3) of Appendix B, Part 171, Customs Regulations (19 CFR), providing as follows:

> Fraud. A violation is determined to be fraudulent if it results from an act or acts (of commission or omission) deliberately done with intent to defraud the revenue or to otherwise violate the laws of the United States, as established by clear and convincing evidence.

The foregoing definition is the usual one in the application of virtually every Federal statute dealing with "fraud." The Committee is aware of a recent initiative by the Customs Service to modify the definition to eliminate the element of intent to deprive the government of revenue or otherwise violate U.S. law. The Committee disagrees with this concept, and it is its intention to retain the present definition in regard to the Secretary's administration of the provision under consideration.

For the purposes of this section, the term "customs law" refers to any Federal law providing a criminal or civil penalty for an act, or failure to act in importing goods into the United States. Among the statutes considered to be customs laws are sections 496 and 1001 (but only with respect to customs matters) and any section of chap-

PRIOR DISCLOSURE

The Joint Industry Group strongly supports the "prior disclosure" provisions enacted by Congress in its 1978 revision of Customs penalties contained in Section 592(c) of the Tariff Act. The prior disclosure provision has been highly successful in promoting compliance with the Customs laws and in encouraging importers to reveal large numbers of violations which would otherwise have gone undetected.

BACKGROUND

In 1978, Congress recognized the value of the "carrot and stick" approach to compliance by encouraging voluntary prior disclosure through mitigated penalities. Congress provided that importers and other concerned parties who voluntarily reveal violations to Customs prior to, or before they learn of, the commencement of a formal investigation of such violation, would be subject to reduced penalties under Section 1592.

Unfortunately in recent years Customs' attitude toward the use of this provision has become more restrictive. For example:

- In 1986, Customs revised its regulations to include a presumption that the disclosing party knew of the commencement of a formal investigation if any Customs officer "informed the person concerning the type or circumstances of the disclosed violation."

- In October 1988, Customs initiated an investigation known as "Operation RAP", and attempted to prevent all parties who might conceivably be involved from making prior disclosures by sending letters to more than 1,000 importers advising them that they were under investigation. These form letters were sent even though Customs had information in its files indicating that most of the importers could not possibly have violated the law. Moreover, in many cases, Customs did not have evidence or reasonable suspicion that these individuals possibly violated the law.

  The implicit threat in the letter resulted in an almost universal lack of cooperation with the investigation, since importers had little or no incentive to come forward, and were likely to be penalized severely if they did.

RECOMMENDATIONS

In order to assure that prior disclosure remains available as a positive element in a voluntary and informed compliance program, the Joint Industry Group recommends that Congress take the following actions.

- **Request Customs to furnish Congress a report concerning its administration of the prior disclosure provisions in Section 592.** The focus of the report should be to ascertain whether Congress' intention to encourage such disclosures is being carried out.

- **Include a provision in Section 592 for determining when a formal investigation actually is commenced.**

- **Revise Section 592** by requiring that:

  -- Customs enter, in writing, in its internal files, the date on which a formal investigation is commenced;

  -- Customs include the following information in any notice informing a person that he is under formal investigation:

  -- the date on which a formal investigation was begun, and the date such formal investigation commencement was entered into its internal records;

  -- the nature, subject and scope of the investigation; and

  -- the basis for Customs' belief on the commencement date that a violation may have occurred.

PRIVATE RIGHT OF ACTION FOR CUSTOMS VIOLATIONS

S. 179, the "Unfair Competition Act of 1989" proposed by Senator Arlen Specter (Attachment A), would allow American manufacturers, producers, or wholesalers injured by violations of the Customs law to bring civil actions in the U.S. District Court for The District of Columbia or the Court of International Trade to seek injunctive relief from and damages for such violations.

The private right of action for customs violation provided by the Unfair Competition Act of 1989 should be opposed for the following reasons:

- **A private right of action for customs violations would subject reputable U.S. companies to harassment in the form of nuisance suits.**

  Unlike the Customs Service, the private individuals who will bring damage suits under the Unfair Competition Act will not have the authority to inspect import shipments prior to U.S. entry of goods. Consequently, private enforcement actions will be based on very little hard information and plaintiffs will rely on the discovery process to determine if their cases have any real merit.

- **A private right of action for Customs violations would weaken Customs Service enforcement and discourage compliance.**

  Congress specifically directed the Customs Service to provide "mitigation of penalties" for individuals who come forward with violations on their own. In addition, Customs uses mitigation of penalties as a means of avoiding extensive litigation over minor disputes. These provisions encourage compliance with the law. However, the Unfair Competition Act would have the perverse effect of discouraging alleged offenders from disclosing violations and paying mitigated penalties.

- **Existing penalties are sufficient to encourage compliance.**

  Under Section 592 of the Tariff Act of 1930, a violation involving "fraud" is punishable by a civil penalty up to the domestic value of the subject merchandise. Violations involving the lesser degrees of culpability such as "gross negligence" or simple "negligence" are punished by equally severe penalties. Harsh penalties already induce legitimate business concerns to make every effort to comply with the law.

ATTACHMENT A

UNFAIR FOREIGN COMPETITION

Mr. SPECTER. Mr. President, I am today introducing the Unfair Foreign Competition Act of 1989. This legislation would give American industries direct access to Federal courts to halt promptly the injurious import of products which are dumped subsidized, or in violation of our customs laws, and to recover monetary damages for such abuses.

The Substance of the Unfair Competition Act of 1989 has previously been considered by the Senate. On March 4, 1982, I introduced S. 2187 to provide a private right of action in Federal court to enforce existing laws prohibiting illegal dumping or subsidizing of foreign imports. Hearings were held on this bill before the Judiciary Committee on May 24 and June 24, 1982. On December 15, 1982, I offered the text of this bill on the Senate floor as an amendment, which was tabled by a slim margin of 51 or 47.

During the 98th Congress, I reintroduced this legislation as S. 418 on February 3, 1983. The Judiciary Committee held a hearing on this bill on March 21, 1983. I offered the text of S. 418 as an amendment to the omnibus tariff bill on September 19, 1984; the amendment was tabled.

During the 99th Congress, I reintroduced this legislation as S. 236; I expanded the scope of this bill to include customs fraud violations and introduced S. 1655 on September 18, 1985. The Judiciary Committee held a hearing on S. 1655 on November 20, 1985, and favorably reported the bill by unanimous voice vote on March 20, 1986. The Finance Subcommittee on International Trade also held a hearing on S. 1655 pursuant to a sequential referral agreement. Significant progress was made toward reaching a unanimous-consent agreement for full Senate consideration of S. 1655 prior to adjournment of the 99th Congress, but the press of other business prevented its coming up for floor action.

Mr. President, the House of Representatives considered during the 99th Congress H.R. 4800, the omnibus trade bill, which included a similar provision, to wit a limited private right of action provision proposed by Representative GUARINI. The Guarini amendment allows a U.S. manufacturer, producer, or wholesaler to file suit in the Court of International Trade for damages from defendants against whom an antidumping order is issued. The House passed H.R. 4800 with overwhelming bipartisan support on May 22, 1986. The omnibus trade bill, including the Guarini amendment, was introduced as H.R. 3 on January 6, 1987.

In the 100th Congress, I reintroduced this legislation as S. 361 to provide a private right of action in Federal court to enforce existing laws prohibiting illegal dumping or customs fraud.

I expanded the scope of this bill revising the subsidy provision in S. 1396 to include a private right of action to allow injured American parties to sue in Federal court for injunctive relief against, and monetary damages from, foreign manufacturers and exporters who receive subsidies, and any importer related to the manufacturer or exporter.

This bill would have provided a comprehensive approach to address three of the most pernicious unfair export strategies used by foreign companies against American companies dumping, subsidies, and customs fraud.

During full Senate consideration of the Omnibus Trade and Competitiveness Act (S. 490), I filed the text of S. 1396 as amendment No. 315 on June 19, 1987, and offered it as an amendment to the trade bill on June 25, 1987. This amendment, however, was tabled. I also filed the Unfair Foreign Competition Act as amendment No. 3314 on September 29, 1988, to the Technical Corrections Act of 1988 (S. 2238).

The unlawful dumping of foreign goods, which involves sales in the United States at artificially low prices, has become a serious threat to American industries. Enormous quantities of dumped and subsidized products and articles which violate the customs laws, enter the United States each year. Existing laws prohibiting such illegal imports are not being adequately enforced, and do not provide remedies sufficient to compensate injured parties or deter future unlawful conduct. As a result, domestic companies are suffering increasing injury, and thou-

sands of American jobs are lost to illegal imports each year.

The bill I introduce today would address this problem by permitting injured American businesses to file suit in Federal court and seek injunctions against, and appropriate damages for these illegal foreign trade practices. On November 20, 1985, the Judiciary Committee held a hearing on this bill's predecessor, S. 1455. Representatives of various domestic industries, including steel, textiles, and apparel, strongly supported enactment of this legislation. Legal experts testified about the urgent need for a private right of action in Federal court to supplement the current administrative practices.

American industries under this bill would be granted direct access to Federal court to seek swift injunctive relief against illegal imports. The availability to U.S. companies of injunctive relief would place foreign "dumpers" on notice that any investment in dumping in the United States would be lost instantaneously.

Under this bill, an injured domestic business could file suit in the U.S. District Court for the District of Columbia or the Court of International Trade for an injunction against the import and sales of the goods which it could preliminarily demonstrate were being dumped or subsidized. The court's order could be modified to provide a more permanent remedy based on a more detailed finding.

During the 1985 Judiciary Committee hearing, witnesses testified regarding the provision of the bill creating injunctive relief to halt illegal imports. Industry representatives indicated that, under existing law, a complaint about unfair dumped or subsidized imports must proceed through a costly and lengthy administrative procedure involving both the Commerce Department and the International Trade Commission; likewise, the Bureau of Customs is increasingly unable to cope with the rising incidence of customs fraud, primarily transshipments through third countries to circumvent a U.S. quota. Although injunctive relief would be a significant alternative to the current administrative process to halt illegal imports, the remedy of primary interest to the witnesses was the retroactive damages provision of the bill.

The availability under this bill of damages to U.S. companies, if dumping and injury are ultimately found to have occurred, will remove the illegally obtained profits of, and increase the cost of dumping for, importers and foreign exporters and producers. Foreign enterprises, like any domestic company, would be held responsible for the economic consequences of their anticompetitive actions.

The current regulatory scheme rarely imposes retroactive duties; it merely restricts future dumping. This bill would allow domestic companies to recover damages for injuries sustained when injunctive relief cannot be timely provided or is otherwise inadequate.

During the 1985 Judiciary Committee hearing, witnesses testified that the bill's provision to seek damages for injury from illegal imports would provide a more effective deterrent than current law, would provide retroactive relief to fill the gap under existing law which imposes duties on only future imports, and would provide damage awards directly to the injured American industries. International trade lawyers also testified during the hearing that the provision of damages for injury sustained from illegal dumped or subsidized imports or customs fraud violations would be consistent with the General Agreement on Tariffs and Trade (GATT).

By the Government's own admission, customs fraud is rampant with regard to textiles, apparel, computer software, hand tools, sugar, electronics, automotive products, chemicals, petrochemicals, agricultural products, pharmaceutical products, and other industries. Illegal dumping is severely injuring American steel, chemical, glass, textile, electronics, agriculture, rubber and cement industries, among others. Foreign subsidies injure American manufacturers of footwear, steel, textiles, apparel, glass, wool, leather, tires, cement, sugar, iron, railway, cars, and other products.

Customs violations appear in several pernicious forms. Massive country-of-origin fraud occurs, whereby a country which—has reached its permissible quota for a given item or product circumvents the quota by transshipping the continued imports through another country which has not yet reached its quota. Most commonly—indeed, in hundreds of thousands of cases—imports are fraudulently mislabeled. Given the sheer volume of imports and the limited resources of the Customs Service, many imported textiles, apparel, and footwear simply are declared to be something which they are not, or are immensely underdisclosed in number—again, in order to evade quotas fixed by the administration.

The Customs Service's Office of Commercial Fraud Enforcement reports that as of September 1, 1988, there were over 3,800 open customs fraud cases. Of these cases, only 559 were accepted by the Office of Enforcement for Investigation, and only 167 grand jury subpoenas were issued.

The Commercial Fraud Enforcement Office also reports that there were more seizures in fiscal year 1988 for textile and apparel violations than for any other violation. The value of these 953 seizures totaled over $56 million. Even more disturbing, the Customs Service estimated that the value of all textile and apparel imports in violation of customs laws was $518 million during that same time period. That figure is expected to rise to $543 million by 1990.

Mr. President, we should not be surprised by recent protectionist calls for new tariffs against goods from countries with large trade surpluses with the United States. I sympathize with the frustrations which lead to such efforts, even as I question their appropriateness. The way to avert such counterproductive measures is to enforce the trade laws which are already in place. This bill will greatly increase the enforcement of those laws, by letting injured American businesses go directly to Federal court—just as they can for violations of the antitrust laws—and seek quick injunctions against continued illegal importation.

The bill I introduced today would in no way interfere with the administration's pursuit of voluntary import restraints. It would offer no new tariffs or quotas or protectionist barriers. It would not displace any existing remedies through the ITC or otherwise. Rather, it would reduce the pressures for resort to such disfavored measures, by allowing vigorous enforcement of laws already on the books.

Mr. President, there is nothing like the vigor of private plaintiffs when it comes to enforcement of trade laws or other means of self-help which have long been demonstrated to be the most effective way to get enforcement and action by those who are most directly affected and injured. We have many decades of evidence of this with regard to private enforcement of our antitrust laws. The theory that private plaintiffs would find strong incentive to bring such antitrust suits—and in so doing would both recoup deserved compensation for their injuries and advance strong national public policy interests—certainly has proved correct. There is no reason that the same would not be true of private suits to enforce our international trade laws.

The legal process is well attuned to this kind of an effective remedy. The case of Marathon versus Mobil Oil is an illustration of a case which involved a complex, factual legal situation which was decided by the U.S. district court in Cleveland in the course of some 6 weeks. It is important to emphasize that once such injunctions are issued they stay in effect and no goods can be shipped in violation of those prohibitions while any appeal is pending. That is so because the order of the district court remains in effect unless and until a supersedeas is ordered, which is not a practical reality given the requirement of posting a bond and the substantial sums of money involved in these matters. Similarly, the Federal discovery procedures lend an excellent avenue for injured U.S. interests to seek discovery from any importer who wants to utilize our markets. If importers wish to do business in the United States, they ought to be subject to the jurisdiction of our courts for equitable relief. They ought to be subject to telling specifically what has happened in terms of subsi-

dies or dumping or in terms of the circuity and violations of the customs laws which are applicable in so many situations.

This is an effective remedy because it does not address the problem after the fact. It stops goods from coming into this country before they can displace American products and American jobs.

We desperately need the vigorous private enforcement this bill would spur if we are to successfully chart a course between the grave dangers of increased protectionism and the certain peril which would result from unabated illegal foreign imports. Accordingly, I urge my colleagues to join in supporting this bill.

I ask unanimous consent that the bill be printed in the Record.

There being no objection, the bill was ordered to be printed in the Record, as follows:

S. 179

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PRIVATE ACTIONS FOR RELIEF FROM UNFAIR FOREIGN COMPETITION.

(a) CLAYTON ACT.—Section 1 of the Clayton Act (15 U.S.C. 12) is amended by inserting "section 801 of the Act of September 8, 1916, entitled 'An Act to raise revenue, and for other purposes' (39 Stat. 798; 15 U.S.C. 72);" after "nineteen hundred and thirteen;".

(b) ACTION FOR DEMURRAGE VIOLATIONS.—Section 801 of the Act of September 8, 1916 (39 Stat. 798; 15 U.S.C. 72) is amended to read as follows:

"Sec. 801. (a) No person shall import or sell within the United States any article manufactured or produced in a foreign country if—

"(1) such article is imported or sold within the United States at a United States price which is less than the foreign market value or constructed value of such article, and

"(2) such importation or sale—

"(A) causes or threatens material injury to industry or labor in the United States, or

"(B) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

"(b) Any interested party whose business or property is injured by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against—

"(1) any manufacturer or exporter of such article, or

"(2) any importer of such article into the United States who is related to the manufacturer or exporter of such article.

"(c) In any action brought under subsection (b), upon a finding of liability on the part of the defendant, the plaintiff shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question, or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained, and

"(3) recover the costs of the action, including reasonable attorney's fees.

"(d)(1) The standard of proof in any action filed under this section is a preponderance of the evidence.

"(2) Upon—

"(A) a prima facie showing of the elements set forth in subsection (a) in an action brought under subsection (b), or

"(B) affirmative final determinations adverse to the defendant that are made by the administering authority and the United States International Trade Commission under section 735 of the Tariff Act of 1930 (19 U.S.C. 1673d) relating to imports of the article in question for the country in which the manufacturer of the article is located,

the burden of proof on such action shall be upon the defendant.

"(e)(1) Whenever, in any action brought under subsection (b), it shall appear to the court that justice requires that other parties be brought before the court, the court may cause them to be summoned, without regard to where they reside, and the subpoenas to that end may be served and enforced in any district of the United States.

"(2) Any foreign manufacturer, producer, or exporter who sells products, or for whom products are sold by another party in the United States, shall be treated as having appointed the District Director of the United States Customs Service of the Department of the Treasury for the port through which the product is commonly imported as the true and lawful agent of such manufacturer, producer, or exporter upon whom may be served all lawful process in any action brought under subsection (b) against such manufacturer, producer, or exporter.

"(f)(1) An action may be brought under subsection (b) only if such action is commenced within 4 years after the date on which the cause of action accrued.

"(2) The running of the 4-year period provided in paragraph (1) shall be suspended while any administrative proceedings under subtitle B of title VII of the Tariff Act of 1930 (19 U.S.C. 1673, et seq.) relating to the product that is the subject of the action brought under subsection (b), or any appeal of a final determination in such proceeding, is pending and for one year thereafter.

"(g) If a defendant in any action brought under subsection (b) fails to comply with any discovery order or other order or decree of the court, the court may—

"(1) enjoin the further importation into, or the sale or distribution within, the United States by such defendant of articles which are the same as, or similar to, those articles which are alleged in such action to have been sold or imported under the conditions described in subsection (a) until such time as the defendant complies with such order or decree, or

"(2) take any other action authorized by law or by the Federal Rules of Civil Procedure, including entering judgment for the plaintiff.

"(h)(1) Except as provided in paragraph (2), the confidential or privileged status accorded by law to any documents, evidence, comments, or information shall be preserved in any action brought under subsection (b).

"(2) The court in any action brought under subsection (b) may—

"(A) examine, in camera, any confidential or privileged material,

"(B) accept depositions, documents, affidavits, or other evidence under seal, and

"(C) disclose such material under such terms and conditions as the court may order.

"(i) Any action brought under subsection (b) shall be advanced on the docket and expedited in every way possible.

"(j) For purposes of this section—

"(1) Each of the terms 'United States price', 'foreign market value', 'constructed value', 'subsidy', and 'material injury', have the respective meaning given such term by title VII of the Tariff Act of 1930.

"(2) If—

"(A) a subsidy is provided to the manufacturer, producer, or exporter of any article, and

"(B) such subsidy is not included in the foreign market value or constructed value of such article (but for this paragraph),

the foreign market value of such article or the constructed value of such article shall be increased by the amount of such subsidy.".

"(k) The court shall permit the United States to intervene in any action brought under subsection (b), as a matter of right. The United States shall have all the rights of a party to such action.

"(l) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).".

(c) ACTION FOR SUBSIDIZE VIOLATIONS.—Title VIII of the Act of September 8, 1916 (39 Stat. 798; 15 U.S.C. 72 et seq.) is amended by adding at the end thereof the following new section:

"Sec. 807. (a) No person shall import or sell within the United States any article manufactured or produced in a foreign country if—

"(1) the foreign country, any person who is a citizen or national of the foreign country, or a corporation, association, or other organization organized in the foreign country, is providing (directly or indirectly) a subsidy with respect to the manufacture, production, or exportation of such article, and

"(2) such importation or sale—

"(A) causes or threatens material injury to industry or labor in the United States, or

"(B) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

"(b) Any interested party whose business or property is injured by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against—

"(1) any manufacturer or exporter of such article, or

"(2) any importer of such article into the United States who is related to the manufacturer or exporter of such article.

"(c) In any action brought under subsection (b), upon a finding of liability on the part of the defendant, the plaintiff shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into, or sale or distribution within, the United States by such defendant of the articles in question, or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained, and

"(3) recover the costs of the action, including reasonable attorney's fees.

"(d)(1) The standard of proof in any action filed under this section is a preponderance of the evidence.

"(2) Upon—

"(A) a prima facie showing of the elements set forth in subsection (a) in an action brought under subsection (b), or

"(B) affirmative final determinations adverse to the defendant that are made by the administering authority and the United States International Trade Commission under section 705 of the Tariff Act of 1930 (19 U.S.C. 1671d) relating to imports of the

article in question for the country in which the manufacturer of the article is located.

the burden of proof in such action shall be upon the defendant.

"(e)(1) Whenever, in any action brought under subsection (b), it shall appear to the court that justice requires that other parties be brought before the court, the court may cause them to be summoned, without regard to where they reside, and the subpoenas to that end may be served and enforced in any district of the United States.

"(2) Any foreign manufacturer, producer, or exporter who sells products, or for whom products are sold by another party in the United States, shall be treated as having appointed the District Director of the United States Customs Service of the Department of the Treasury for the port through which the product is commonly imported as the true and lawful agent of such manufacturer, producer, or exporter upon whom may be served all lawful process in any action brought under subsection (b) against such manufacturer, producer, or exporter.

"(f)(1) An action may be brought under subsection (b) only if such action is commenced within 4 years after the date on which the cause of action accrued.

"(2) The running of the 4-year period provided in paragraph (1) shall be suspended while any administrative proceedings under subtitle A of title VII of the Tariff Act of 1930 (19 U.S.C. 1671, et seq.) relating to the product that is the subject of the action brought under subsection (b), or any appeal of a final determination in such proceeding, is pending and for one year thereafter.

"(g) If a defendant in any action brought under subsection (b) fails to comply with any discovery order or other order or decree of the court, the court may—

"(1) enjoin the further importation into, or the sale or distribution within, the United States by such defendant of articles which are the same as, or similar to, those articles which are alleged in such action to have been sold or imported under the conditions described in subsection (a) until such time as the defendant complies with such order or decree, or

"(2) take any other action authorized by law or by the Federal Rules of Civil Procedure, including entering judgment for the plaintiff.

"(h)(1) Except as provided in paragraph (2), the confidential or privileged status accorded by law to any documents, evidence, comments, or information shall be preserved in any action brought under subsection (b).

"(2) The court in any action brought under subsection (b) may—

"(A) examine, in camera, any confidential or privileged material,

"(B) accept depositions, documents, affidavits, or other evidence under seal, and

"(C) disclose such material under such terms and conditions as the court may order.

"(i) Any action brought under subsection (b) shall be advanced on the docket and expedited in every way possible.

"(j) For purposes of this section, each of the terms 'subsidy' and 'material injury' have the respective meaning given such term by title VII of the Tariff Act of 1930.

"(k) The court shall permit the United States to intervene in any action brought under subsection (b) as a matter of right. The United States shall have all the rights of a party to such action.

"(l) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).".

(d) ACTION FOR CUSTOMS FRAUD.—

(1) Chapter 95 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1586. Private enforcement action for customs fraud

"(a) Any interested party whose business or property is injured by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930 (19 U.S.C. 1592) may bring a civil action in the district court of the District of Columbia or in the Court of International Trade, without respect to the amount in controversy.

"(b) Upon proof by an interested party that the business or property of such interested party has been injured by a fraudulent, grossly negligent, or negligent violation of section 592(a) of the Tariff Act of 1930, such interested party shall—

"(1) be granted such equitable relief as may be appropriate, which may include an injunction against further importation into the United States of the articles or products in question, or

"(2) if such injunctive relief cannot be timely provided or is otherwise inadequate, recover damages for the injuries sustained, and

"(3) recover the costs of suit, including reasonable attorney's fees.

"(c) For purposes of this section—

"(1) The term 'interested party' means—

"(A) A manufacturer, producer, or wholesaler in the United States of a like or competing product, or

"(B) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product or a competing product in the United States.

"(2) The term 'like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930.

"(3) The term 'competing product' means a product which competes with or is a substitute for products being imported into the United States in violation of section 592(a) of the Tariff Act of 1930.

"(d) The court shall permit the United States to intervene in any action brought under this section, as a matter of right. The United States shall have all the rights of a party.

"(e) Any order by a court under this section is subject to nullification by the President pursuant to the President's authority under section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702).".

(2) The table of contents for chapter 95 of title 28, United States Code, is amended by adding at the end thereof the following:

"1586. Private enforcement action for customs fraud.".

SEC. 5. ACCORDANCE WITH GATT.

It is the sense of the Congress that the provisions of this Act are consistent with, and in accord with, the General Agreement on Tariffs and Trade (GATT).

"DETENTION" OF MERCHANDISE

The Joint Industry Group opposes unwarranted detention of merchandise and urges Congress to ensure that importers are provided due process in the event of detention actions by the U.S. Customs Service

BACKGROUND

Importers are encountering increasing incidence of unwarranted delays between the time of merchandise entry and Customs' decision to either accept or reject the entry, or seize the subject merchandise. These indefinite "detentions" result from delays in inspecting or testing merchandise, or inquiries or investigations to confirm the accuracy of documents or the admissibility of merchandise.

While Customs is mandated to inspect, examine and appraise imported merchandise (Attachment A), business conditions and good governmental management require that such necessary functions be performed within a reasonable time. However, current law does not clarify "reasonable" and is unclear as to whether an unwarranted or lengthy "detention" is a matter subject to judicial review. Further, while Customs has recognized in its regulations the need to allow importers to file an administrative protest and obtain a Customs decision on the release of merchandise within 30 days (Attachment B), there currently exists no remedy if Customs fails to make a timely decision.

In an April 1989 decision, the Court of International Trade (CIT) addressed the issue of unwarranted detentions. The Court's position is that, in those cases where the Court has jurisdiction, the earliest a protestant in a detention case might obtain judicial review is 90 days after Customs' denial (or refusal to act) -- a full 120 days subsequent to the protest filing (Attachment C). In effect, legitimate merchandise may be denied entry for a minimum of four months, a time frame that imposes an unreasonable burden on the trade community.

RECOMMENDATIONS

The Joint Industry Group recommends the following actions to remedy the problems of unwarranted detentions and to ensure due process in the event detentions occur.

- Require the Customs Service to complete its inspection, examination, appraisement and other necessary functions as promptly as possible.

- Require Customs to send importers of detained merchandise written notice, within five days of filing an entry, indicating:
  - -- the reason for detention,
  - -- the nature of tests or inquiries to be conducted,
  - -- the tests and results will be furnished to the importer upon request,
  - -- the expected completion date of the testing or inquiries, and
  - -- the nature of any data to be supplied by the importer to aid in the completion of the inquiry.

- Permit importers to obtain immediate judical review of detentions where Customs has not made a decision on the release or admissibility of merchandise within 30 days of the entry filing date. Possible remedies could include a court order that Customs make an immediate release or admissibility decision on the detained merchandise, or that Customs immediately release the merchandise if there is not reasonable cause to believe that the merchandise is inadmissible.

ATTACHMENT FOR DETENTION

Attachment A

§ 1499. Examination of merchandise

Imported merchandise, required by law or regulations made in pursuance thereof to be inspected, examined, or appraised, shall not be delivered from customs custody, except under such bond or other security as may be prescribed by the Secretary of the Treasury to assure compliance with all applicable laws, regulations, and instructions which the Secretary of the Treasury or the Customs Service is authorized to enforce until it has been inspected, examined, or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States. Such officer shall designate the packages or quantities covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise and shall order such packages or quantities to be sent to the public stores or other places for such purpose. Not less than one package of every invoice and not less than one package of every ten packages of merchandise, shall be so designated unless the Secretary of the Treasury, from the character and description of the merchandise, is of the opinion that the examination of a less proportion of packages will amply protect the revenue and by special regulation or instruction, the application of which may be restricted to one or more individual ports or to one or more importations or one or more classes of merchandise, permit a less number of packages to be examined. All such special regulations or instructions shall be published in the weekly Treasury Decisions within fifteen days after issuance and before the liquidation of any entries affected thereby. Such officer may require such additional packages or quantities as he may deem necessary. If any package contains any article not specified in the invoice and, in the opinion of the appropriate customs officer, such article was omitted from the invoice with fraudulent intent on the part of the seller, shipper, owner, or agent, the contents of the entire package in which such article is found shall be subject to seizure, but if no such fraudulent intent is apparent, then the value of said article shall be added to the entry and the duties thereon paid accordingly. If a deficiency is found in quantity, weight, or measure in the examination of any package, report thereof shall be made to the appropriate customs officer, who shall make allowance therefor in the liquidation of duties.

No appraisement made after the effective date of the Customs Administrative Act of 1938 shall be held invalid on the ground that the required number of packages or the required quantity of the merchandise was not designated for examination or, if designated, was not actually examined, unless the party claiming such invalidity shall establish that merchandise in the packages or quantities not designated for examination, or not actually examined, was different from that actually examined and that the difference was such as to establish the incorrectness of the appraisement; and then only as to the merchandise for which the appraisement is shown to be incorrect.

June 17, 1930, c. 497, Title IV, § 499, 46 Stat. 728; June 25, 1938, c. 679, §§ 15, 16(a), 52 Stat. 1084; June 2, 1970, Pub.L. 91-271, Title III, § 301(k), 84 Stat. 289.

Attachment B

Subpart C—Review and Disposition of Protests

§ 174.21 Time for review of protests.

(a) *In general.* Except as provided in paragraph (b) of this section, the district director shall review and act on a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), within 2 years from the date the protest was filed. If several timely filed protests are treated as part of a single protest pursuant to § 174.15, the 2-year period shall be deemed to run from the date the last such protest was filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514).

(b) *Protests relating to exclusion of merchandise.* If the protest relates to an administrative action involving exclusion of merchandise from entry or delivery under any provision of the Customs laws, the district director shall review and act on a protest filed in accordance with section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), within 30 days from the date the protest was filed, unless the person filing the protest shall request an additional delay for the purpose of presenting evidence or argument with respect to the matters involved in the protest. In no event shall the district director (or the Commissioner of Customs or his designee if the protest is the subject of further review as provided for in §§ 174.25 and 174.26) delay action on the protest beyond 30 days, or such additional time period as may be agreed to by the person filing the protest. Any protest filed pursuant to this paragraph shall clearly so state on its face.

[T.D. 74-37, 39 FR 2470, Jan. 22, 1974]

Attachment C

(Slip Op. 89–44)

CHERRY LANE FASHION GROUP, INC., PLAINTIFF v. UNITED STATES; JOHN H. HEINRICH, DISTRICT DIRECTOR; ROBERT T. HENDERSON, IMPORT SPECIALIST; AND SANTIAGO LAHOZ, JR., IMPORT SPECIALIST, DEFENDANTS

Court No. 88-08-00668

A protest filed pursuant to 19 C.F.R. § 174.21(b) (1988) is entitled to accelerated administrative consideration within 30 days, but violation of that time limit does not confer jurisdiction under 19 U.S.C. § 1515(b) or 28 U.S.C. § 1581(a) or (i) (1982). In the absence of other jurisdiction, the importer has not met its burden of proving jurisdiction to enter the requested declaratory and injunctive relief.

[Action dismissed for lack of subject matter jurisdiction.]

(Decided April 6, 1989)

Law Offices of Elon A. Pollack (*Elon A. Pollack* and *Michael R. Doram*) for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*) for defendant.

DICARLO, *Judge*: The Cherry Lane Fashion Group, Inc. (the "importer") filed a summons and complaint to contest an alleged deemed denial of an accelerated protest filed pursuant to 19 C.F.R. § 174.21(b) (1988) against a detention of women's wearing apparel to investigate a possible quota exclusion. Two days after the civil action was filed, the United States Customs Service (Customs) released the imported merchandise. Defendant now moves pursuant to Rule 12(b) of the Rules of this Court to dismiss the importer's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

The Court finds that a protest filed pursuant to 19 C.F.R. § 174.21(b) (1988) is entitled to accelerated administrative consideration within 30 days, but violation of that time limit does not confer jurisdiction under 19 U.S.C. § 1515(b) or 28 U.S.C. § 1581(a) or (i) (1982). In the absence of jurisdiction obtained by filing a protest and subsequent denial, and in the absence of the Court's residual jurisdiction under 28 U.S.C. § 1581(i) because the importer could have

utilized a procedure for accelerated disposition of a protest under 19 U.S.C. § 1515(b), the Court lacks jurisdiction to enter the requested declaratory or injunctive relief under the Administrative Procedure Act.

BACKGROUND

The importer was the consignee of a shipment of 100% cotton singlets imported from Fiji through the port of Los Angeles on March 23, 1988. The singlets were fashioned from fabric manufactured in Hong Kong. Customs notified the importer by an undated letter that it was detaining the merchandise as of April 26, 1988 "because the admissibility of this merchandise made in Fiji is being thoroughly investigated." As authority for its detention, Customs invoked 19 U.S.C. § 1499 (1982), which provides that:

> Imported merchandise, required by law or regulations * * * to be inspected, examined, or appraised, shall not be delivered from customs custody, * * * until it has been inspected, examined or appraised and is reported by the appropriate customs officer to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States.

The imported merchandise was subject to quota and visa requirements if manufactured in Hong Kong, but not if manufactured in Fiji.

On May 5, 1988, the importer filed a protest against the detention, including a statement that the protest must be processed within 30 days under 19 C.F.R. § 174.21(b) (1988). After more than 30 days had elapsed, the importer filed a civil action on August 23, 1988 (i.e., 110 days after filing the original protest), alleging jurisdiction under 28 U.S.C. § 1581(a) and (i)(3) and (4) (1982). Customs released the merchandise two days later on August 25, 1988. Duties were subsequently paid and the entries liquidated. The protest was finally acted upon and "approved" on November 15, 1988 "to the extent that the merchandise had been released." A copy of the approved protest was sent to the importer after an affidavit filed in this Court on January 13, 1989 affirmed that the importer had not received any notice regarding the disposition of its protest.

DISCUSSION

Once jurisdiction is challenged, the plaintiff must prove that jurisdiction in this court is proper. *McNutt* v. *General Motors Acceptance Corp*, 298 U.S. 178, 189 (1936); *Dennison Mfg. Co.* v. *United States*, 12 CIT ——, 678 F. Supp. 894, 896 (1988); *Lowa Ltd.* v. *United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984).

The importer alleges jurisdiction under 28 U.S.C. § 1581(a) (1982), which allows judicial review of Customs' denial of a protest filed pursuant to 19 U.S.C. § 1514(a)(4) (1982) relating to "the exclusion of merchandise from entry or delivery * * * under any provision of the customs laws * * *."

The importer also alleges jurisdiction under 28 U.S.C. § 1581(i)(3) and (4) (1982), which grant the court exclusive jurisdiction over civil actions commenced against the United States, its agencies, and its officers that arise out of any federal law providing for administration and enforcement of quotas.

I. JURISDICTION BASED ON A "DEEMED DENIAL" OF A PROTEST

The importer asserts that because its protest stated that it must be reviewed and acted upon within 30 days under 19 C.F.R. § 174.21(b) (1988), a time-limit only applicable when invoked, the protest must be deemed to have been denied. The government argues that passage of 30 days without action does not constitute a deemed denial for jurisdictional purposes.

a. *Jurisdiction under 28 U.S.C. § 1581(a).*

19 C.F.R. § 174.21(b) (1988) states that when a protest is filed relating to the exclusion of merchandise, Customs shall review and act on the protest within 30 days. *See Arbor Foods, Inc.*, v. *United States*, 8 CIT 355, 359, 600 F. Supp. 217, 220 (1984). Violation of the time period does not, however, assure jurisdiction in the Court of International Trade. *See American Air Parcel Forwarding Co.* v. *United States*, 2 Fed. Cir. (T) 1, 7, 718 F.2d 1546, 1551 (1983), *cert. denied*, 466 U.S. 937 (1984) (finding no relationship between Customs' violation of a regulation and jurisdiction in the Court of International Trade).[1]

An importer may obtain judicial review on an accelerated basis by filing a protest under 19 C.F.R. § 174.22 (1988), which follows the jurisdictional route provided by Congress under 19 U.S.C. § 1515(b) to reach the court within 120 days. The statute provides:

> A request for accelerated disposition of a protest filed in accordance with [19 U.S.C. § 1514] may be mailed by certified or registered mail to the appropriate customs officer any time after ninety days following the filing of such protest. For purposes of [28 U.S.C. § 1581], a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

[1] Jurisdiction was alleged under 19 U.S.C. § 1515(b) and 28 U.S.C. § 1581(a) when no action was taken on a protest filed under 19 C.F.R. § 174.21(b) in *Yaw Fashions Co.* v. *United States*, 10 CIT 189, 190 n.2, 632 F. Supp. 41, 43 n.2, *aff'd*, 804 F.2d 126n (Fed. Cir. 1986), *cert. denied*, 481 U.S. 1064 (1987), but jurisdiction was not challenged in that action.

19 U.S.C. § 1515(b) (1982). Under this statute, an importer may request an accelerated disposition *after* 90 days of the protest. If Customs does not act upon the request for accelerated disposition within another 30 days, the protest is deemed to be denied for purposes of 28 U.S.C. § 1581 and the importer may file an action in the Court of International Trade within 180 days. *See American Air Parcel Forwarding Co.*, 2 Fed. Cir. (T) 1, 6, 718 F.2d 1546, 1550–51 (1983), *cert. denied*, 466 U.S. 937 (1984); *Allen Sugar Co.* v. *Brady*, 13 CIT ——, Slip Op. 89–16, at 6–7 (Feb. 9, 1989).

While there is a jurisdictional "deemed denial" under 19 U.S.C. § 1515(b) for inaction under 19 C.F.R. § 174.22, there is no statutory "deemed denial" for inaction under 19 C.F.R. § 174.21(b). Furthermore, 19 C.F.R. § 174.31 (1988) explains that any person may file an action within 180 days after a protest, for which accelerated disposition was requested, is deemed to have been denied in accordance with 19 C.F.R. § 174.22(d). There is no intimation in 19 C.F.R. § 174.31, however, that violation of 19 C.F.R. § 174.21(b) constitutes a deemed denial. In contrast to the express deemed denial provision in 19 C.F.R. § 174.22(d), there is no deemed denial provision in 19 C.F.R. § 174.21(b) for violation of the 30-day time period in that regulation.

The Court finds that passage of 110 days without action on the protest filed under 19 C.F.R. § 174.21(b) (1988), although violative of Customs' 30-day regulation, does not constitute a deemed denial for jurisdictional purposes under 28 U.S.C. § 1581(a) (1982). The importer has not complied with the procedures to invest the Court with jurisdiction under 28 U.S.C. § 1581(a).

b. *Jurisdiction under 28 U.S.C. § 1581(i).*

28 U.S.C. § 1581(i) is not to be used generally to bypass administrative review by valid protest and denial. *United States* v. *Uniroyal, Inc.*, 69 CCPA 179, 184, 687 F.2d 467, 472 (1982). The residual jurisdiction of the Court under (i) is available only when another jurisdictional basis is unavailable or the remedy provided under the other subsection is manifestly inadequate. *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 773 (1988); *Allen Sugar Co.* v. *Brady*, 13 CIT ——, Slip Op. 89–16, at 6 (Feb. 9, 1989).

The importer's remedy is not manifestly inadequate. If Customs had not released the merchandise, the Court would have had jurisdiction under 28 U.S.C. § 1581(a) over a live action filed ten days later if a request for accelerated disposition had been made pursuant to 19 U.S.C. § 1515(b) (1982) and 19 C.F.R. § 174.22 (1988). In this case, however, no request was made under 19 U.S.C. § 1515(b) or 19 C.F.R. § 174.22 and Customs released the merchandise 112 days after the protest was filed pursuant to 19 C.F.R. § 174.21. The Court finds that it lacks jurisdiction under 28 U.S.C. § 1581(i) (1982).

The importer does state that it would have remedies available if the goods were either excluded or seized, rather than "detained." *See Milin Indus. v. United States*, 12 CIT ——, 691 F. Supp. 1454 (1988). Although the importer claims it was forced to wait without remedy at the sole discretion of Customs to act because the goods were detained, the Supreme Court recently stated that a "seizure" occurs when a thing is the object of a "detention." *Brower v. County of Inyo*, No. 87-248 (S. Ct. Mar. 21, 1989) (citing *Hill v. California*, 401 U.S. 797, 802-805 (1971)).

c. *Mootness.*

Even if the Court were to have jurisdiction under 28 U.S.C. § 1581(a) or (i) to review the detention, the merchandise has since been released. The relief sought on the first and second causes of action is for an order compelling Customs to "immediately release the merchandise for entry for consumption." Complaint at 8. Because the merchandise has been released, the importer has received its requested relief and the first two causes of action are moot. *See Commercial Cable Co. v. Burleson*, 250 U.S. 360, 362-63 (1919) (suit to enjoin government's seizure of marine cable lines dismissed as moot when the lines were returned while the appeal was pending). Where one of several issues presented becomes moot, the issue is whether the remaining causes of action supply the constitutional requirement of a case or controversy. *Powell v. McCormack*, 395 U.S. 486, 497 (1968).

II. Declaratory and Injunctive Relief

The remainder of the importer's complaint asks for declaratory and injunctive relief. The requirements for a justifiable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. *Alabama Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

The third and fourth counts of the complaint relate to the administration and enforcement of a quota. The fifth count requests injunctive relief against individual Customs officers to prohibit them from detaining textile products under 19 U.S.C. § 1499 where merchandise is secured by a bond.

Count three requests an order declaring application of 19 U.S.C. § 1499 as "an unlawful taking of property." Complaint at 8. Count four requests an order declaring that 19 U.S.C. § 1499 does not authorize detention of merchandise when an entry bond is posted as security. The importer states that Customs' reliance on 19 U.S.C. § 1499 is unauthorized because the statute lacks limits or guidelines as to the period or grounds of detention, and that the statute is unconstitutionally vague because it permits Customs to detain merchandise arbitrarily and indefinitely.

The importer argues that Customs acted unreasonably and without authority when it characterized its action as a "detention" and refused to act on the protest. The importer states that Customs' inaction constitutes an agency action which is reviewable under the Administrative Procedure Act, 5 U.S.C. § 702 and § 704 (1982 & Supp. V 1987).

5 U.S.C. § 702 (Supp. V 1987) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review * * *." Section 702 does not, however, afford an independent basis of subject matter jurisdiction. *Kidco, Inc.* v. *United States*, 4 CIT 103, 104 (1982). Although any person aggrieved by agency action within the meaning of 5 U.S.C. has standing to bring an action pursuant to 28 U.S.C. § 2631(i) (1982), this statute does not afford an implied grant of subject matter jurisdiction permitting judicial review of agency action. *Cheng Shin Rubber Indus. Co.* v. *United States*, 4 CIT 224, 229, 551 F. Supp. 684, 687 (1982) (citing *Califano* v. *Sanders*, 430 U.S. 99 (1977)).

5 U.S.C. § 704 (1982) provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." Section 704 authorizes an action for review of final agency action only to the extent that other statutory procedures for judicial review are inadequate. *Federal Communications Comm'n* v. *ITT World Communications, Inc.*, 466 U.S. 463, 469 (1984). *See also Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2736–37 (1988) ("When Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies").

In the absence of jurisdiction under 28 U.S.C. § 1581(a) obtained by filing a protest and subsequent denial, and in the absence of residual jurisdiction under 28 U.S.C. § 1581(i) because the importer could have utilized the procedure to obtain accelerated review under 19 U.S.C. § 1515(b), the Court lacks jurisdiction under 5 U.S.C. §§ 702 or 704 to enter the requested declaratory and injunctive relief. The Administrative Procedure Act does not afford an implied grant of subject matter jurisdiction permitting judicial review of agency action. *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977); *National Corn Growers Ass'n* v. *Baker*, 840 F.2d 1547, 1559 (Fed. Cir. 1988); *American Air Parcel Forwarding Co., Ltd.* v. *United States*, 2 Fed. Cir. (T) 1, 8–9, 718 F.2d 1546, 1552 (1983), *cert. denied*, 466 U.S. 937 (1984); L. Modjeska, *Administrative Law: Practice and Procedure* § 6.1, at 176 (1982).

CONCLUSION

The Court has no jurisdiction over a civil action under 28 U.S.C. § 1581(a) or (i) (1982) to contest an alleged deemed denial of an accelerated protest filed under 19 C.F.R. § 174.21 (1988). In the absence of jurisdiction under 28 U.S.C. § 1581(a) obtained by filing a protest and subsequent denial, and in the absence of the Court's residual jurisdiction under 28 U.S.C. § 1581(i) because the importer could have utilized the procedure for an accelerated protest under 19 U.S.C. § 1515(b), the Court may not enter the requested declaratory or injunctive relief under the Administrative Procedure Act. This Court may not extend its jurisdiction where none exists, even in the interests of justice. *See Christianson* v. *Colt Indus. Operating Corp.*, 108 S. Ct. 2166, 2178 (1988). The Court grants the defendant's motion to dismiss for lack of subject matter jurisdiction.

Mr. CROSS. Thank you, Mr. Chairman.

I would like to take just a minute of the subcommittee's time to express my deep appreciation to the Joint Industry Group for the honor they have given me by electing me as their new chairman.

Mr. Kumm has led our efforts over the past 5 years by encouraging dialog between industry and Government on Customs-related issues. During my own stewardship as chairman, I hope to continue and expand this dialog.

The interest on Customs issues of the administration, the Congress and U.S. industry should be and are very similar. In its efforts to be competitive in worldwide commerce today, American business is concerned about globalization, global sourcing, just-in-time manufacturing, and being low-cost producers of the highest quality products.

Customs policies and practices are extremely important in each of these contexts. In my tenure, as chairman, I hope to focus the Joint Industry Group on how best to consult with the Congress and the administration to explore jointly the avenues by which commonly agreed upon policies and practices can promote and increase U.S. competitiveness.

These hearings mark a useful start down this road. The statements made by the three panel members following me will focus on fixing what needs to be done to resolve today's problems and to lay a basis for creating a Customs Service second to none in the future.

Mr. Chairman, I look forward to working closely with you and the subcommittee and the staff for the next couple of years.

I will turn it over now to Mr. Outman.

STATEMENT OF WILLIAM D. OUTMAN II, CHAIRMAN, COMPLIANCE AND ENFORCEMENT COMMITTEE, JOINT INDUSTRY GROUP

Mr. OUTMAN. Mr. Chairman, my name is William D. Outman and I am a partner in the Washington office of Baker & McKenzie, and also serve as chairman of the Joint Industry Group's committee on enforcement and compliance.

Ken Kumm has given you an overview of our presentation and I merely wish to address five subissues which are properly on your plate at the present time. As Ken has suggested I think that it is appropriate that we direct our initial comments to the first of the findings by the oversight committee, namely that there has been a deterioration in the relationship between the Customs Service and the international trade community.

This is due, in large part, to a breakdown in communication, and in chief, I think the blame for this must necessarily lie at the door of the Customs Service. The solution is a rather simple one, the rules have to change.

Because of time constraints I will not be able to comment on each of the five points in any major detail. I would note, therefore, in terms of starting a communications process going, section 101 of the Pease-Frenzel bill contains important statutory provisions requiring the Customs Service to give notice and receive comments from the public before acting. In too many cases, of recent time,

the actions have been taken, and then the comments have been solicited.

Second, I would note that the subcommittee's investigation and oversight here has led the Customs Service to modify further its national policies in connection with seizure authority provided under section 596(c) of the Tariff Act.

This was a provision adopted in 1986 as part of the omnibus anti-drug bill, and the Joint Industry Group has been opposed from the beginning to the grant of the Customs Service authority to seize merchandise in commercial transactions in view of the Congress' clear intention as manifest in the Customs Procedural Reform and Simplification Act of 1978, that civil penalties should be imposed on an in persona basis except in the few instances covered in section 592(d).

I would remind you that in section 592(d) the Customs Service has been empowered since 1978, if it had reasonable cause to seize merchandise where necessary "to prevent the introduction of prohibited or restricted merchandise into the Customs territory of the United States."

This provided unquestioned authority for the Service to enforce quotas which we know to be a matter of concern both to your committee and to our members. Since 1988, however, the Customs Service has elected to use the "in-rem" authority in section 596(c) to seize all merchandise in a shipment if anything is the least bit untoward, including articles that could legitimately enter the United States. In many instances this has brought importers literally to their knees.

Now, the Customs Service has told us that things are better today, and I would remind the committee that when the guidelines were first issued in 1987 regarding section 596, we have since seen refinements on May 11, 1987; December 17, 1987; January 26, 1988; August 11, 1989; and then more recently here in 1990.

And in every instance it has been a cry from the importing public or a documented sense or case of abuse that has forced the Customs Service to modify its program. Your oversight report documents these.

The Joint Industry Group believes as it did in the late 1970's that the seizure of merchandise in the commercial context, under which most of these actions have taken place, cannot be handled by continued modifications to administrative policy. It is a classic case of trying to make a silk purse out of a sow's ear.

In section 102 of the Pease-Frenzel bill there is language modifying the seizure authority under section 596(c), and we obviously support that measure.

As a third point, approximately 3 years ago, the Customs Service issued a proposed notice of rulemaking whereby it sought to redefine the terms, fraud, gross negligence and negligence. These are words used with purpose in section 592 of the Tariff Act. And for a number of years they have been specifically defined in appendix B to part 171 of the Customs Service's own regulations.

After having received 65 comments opposing this change, in July 1989, the Customs Service issued a final rule adopting the change. We should note that the action taken by the Customs Service was

also in disregard of the views expressed by the Ways and Means Committee in its report to H.R. 3.

To restore balance in this area, indeed to return to the rules of the game when the Congress had in mind when they changed the 592 provisions in 1978, we support section 103 of the Pease-Frenzel bill which provides for the definitions of fraud, gross negligence and negligence used by the Customs Service in its regulations for the better part of two decades.

There is a fourth area in which the Customs Service has failed, we believe, in its guise to interpret existing law, and it has to do with of prior disclosure. Again, time does not permit me to go into detail here, but I would point out for the committee's attention the fact that it is viewed in the field as one of truly hard-line challenging effort. Someone comes forward to make a prior disclosure and that individual, company person is challenged at every turn as it is motives were not well-served or that it was trying to beat some kind of clock.

I think this should change, and the Pease-Frenzel bill works toward this effort.

As a final point, I would note that there is a growing practice we see in the field, in which merchandise is not seized; it is not permitted entry; it is detained. And this is a limbo that has no particular statutory blessing. In section 107 of the Pease-Frenzel bill we have established rules which will help ameliorate this, and the Joint Industry Group recognizes that there may be refinements needed here, but at least it is a statutory start. At this time, I would turn the Joint Industry Group's presentation over to Mr. Hardy, who is at the far end of the panel.

[The statement of Mr. Outman follows:]

STATEMENT OF WILLIAM D. OUTMAN, II, CHAIRMAN, COMMITTEE ON ENFORCEMENT AND COMPLIANCE, JOINT INDUSTRY GROUP, AT A HEARING ON THE COMMERCIAL AND TRADE OPERATIONS OF THE U.S. CUSTOMS SERVICE BEFORE THE SUBCOMMITTEE ON TRADE IN CONJUNCTION WITH THE SUBCOMMITTEE ON OVERSIGHT, HOUSE COMMITTEE ON WAYS AND MEANS
MAY 2, 1990

Mr. Chairman, my name is William D. Outman. I am a partner in the Washington office of Baker & McKenzie and serve as Chairman of the Joint Industry Group's Committee on Enforcement and Compliance. Ken Kumm has given you an overview of our presentation. I wish to address five sub-issues that fall under the aegis of your Committee.

It is appropriate that we direct our initial comments to the first of the findings of the Subcommittee on Oversight: namely, that there has been a deterioration in the relationship between the Customs Service and the international trade community. This is due to a breakdown in communication. In chief, the blame for this must necessarily lie at the door of the Customs Service. The solution is a rather simple one: the rules have to change.

The Joint Industry Group believed initially that the Customs Service could meet its obligation through an increase in the communication flow to the public. This was envisioned with the adoption in 1978 of section 625 of the Tariff Act of 1930 (the "Act") which required publication of precedential decisions. That has not been implemented. Worse, we find out after the fact how the Customs Service thinks and how it intends to react. Accordingly, in section 101 of the legislation introduced yesterday by Congressmen Pease and Frenzel, there are specific provisions reaffirming that all rules and regulations issued by the Customs Service pursuant to authority contained in 19 U.S.C. § 66 be promulgated in accordance with the Administrative Procedure Act. Further, any decision modifying or revoking any previously published ruling or regulation must also be issued in conformity with the notice and comment requirements of the APA. With equal import, the Joint

Industry Group supports those provisions in the Pease-Frenzel Bill which will require the Customs Service to make public its notice of intent to limit any court decision. Finally, provision has been made in the newly-introduced measure for the appeal of an adverse interpretive ruling within the Customs Service. We believe these will serve the goals envisioned by the drafters of the Oversight Report that there should be a maximization of the "flow of information to the trade community prior to implementing new policies or procedures which can reasonably be expected to have an impact on trade community operations."

The Subcommittee's investigation has led the Customs Service to modify further its national policies in connection with seizure authority provided under section 596(c) of the Act. This was a provision adopted in 1986 as part of the Omnibus Anti-drug Bill. The Joint Industry Group has been opposed from the beginning in the grant to the Customs Service of authority to seize merchandise in commercial transactions in view of the Congress's clear intention, as manifest in the Customs Procedural Reform and Simplification Act of 1978, that civil penalities should be imposed on an in personam basis except in those few instances set forth in section 592(d) of the Act. Under section 592(d), the Customs Service has been empowered since 1978, if it has reasonable cause, to seize merchandise where necessary "to prevent the introduction of prohibited or restricted merchandise into the Customs territory of the United States." This has provided unquestioned authority for the Service to enforce quotas (i.e., seize garments that may be in excess of those authorized). Since 1988, however, the Service has elected to use the in rem authority in section 596(c) of the Act to seize all merchandise, including articles that could lawfully be admitted entry, in order to bring importers literally to their knees.

The first guidelines for penalties and seizures under authority of section 596(c) of the Act were issued by the Customs Service March 27, 1987. Since that time, refinements have been issued on May 11, 1987, December 17, 1987, January 26, 1988 and, most recently, under date of August 11, 1989. In every instance, it has been the cry

from the importing public and the wanton abuses of seizure authority that have forced the Customs Service to modify its stand. The Oversight Report documents these abuses.

The Joint Industry Group believes, as it did in the late 1970s, that seizure of merchandise in the commercial context, under which most of these actions has taken place, cannot be handled by continued modifications to administrative policy. It is a classic case of trying to make a silk purse out of a sow's ear.

In section 102 of the Pease-Frenzel Bill, there is language modifying the seizure authority under section 596(c) of the Act, limiting it to those cases involving merchandise, which cannot be the subject of the imposition of a civil penalty under section 592 of the Act. We support this provision and believe that it will restore balance to the Customs Service's enforcement activities.

To illustrate how little deference has been given by the Customs Service to the views of the importing community, last year the trade community witnessed a situation somewhat unparalleled in recent memory. Approximately three years ago, the Customs Service issued a notice of proposed rule making whereby it sought to redefine the terms fraud, gross negligence and negligence. These are words used with purpose in section 592 of the Act and which, for a number of years, have been specifically defined in Appendix B to part 171 of the Customs Service's Regulations. After having received sixty-five comments, only two of which could be arguably said to be other than wholly in opposition to the Customs Service's proposal, in July, 1989, the Customs Service issued a final rule setting forth amended definitions of fraud and gross negligence. We should note that the action taken by the Customs Service was in disregard of the views expressed by the Committee on Ways and Means in its report to H.R. 3.

This is one of those areas in which the trade community and the Customs Service simply do not see eye-to-eye. The

Customs Service wishes to change the rules of the game. We are opposed. To restore balance in this area, indeed to return to the rules of the road in effect at the time Congress revised section 592 in 1978, we support section 103 of the Pease-Frenzel Bill which provides for the definitions of fraud, gross negligence and negligence used by the Customs Service in its regulations for the better part of the past two decades.

There is a fourth area in which the Joint Industry Group believes the Customs Service has failed in its interpretation of existing statutory law. We speak in this case of the rules set forth in section 592(c)(4) of the Act which encourages persons having violated Customs law to come forward and disclose the circumstances of the violation. It is called "Prior Disclosure." The statute requires that this disclosure be made before, or without knowledge of, the commencement of a formal investigation of such violation. From an administrative perspective, the Customs Service has taken a hardline, challenging, certainly in the Field, almost every effort to claim the benefits accorded those making prior disclosures. In one rather extreme case, known by the code name "Operation RAP," the Customs Service sent letters to some 1,100 importers advising them they were under formal investigation. It was a fishing expedition of the worst magnitude. Implicit in the letter was the understanding that the prior disclosure benefits would not be available to any recipient of the letter.

To help correct Customs abuses in this area, section 104 of the Pease-Frenzel Bill would amend the prior disclosure rules to provide that commencement of a formal investigation will be deemed to occur on the date on which the Customs Service has reasonable cause to believe that a violation of section 592 has occurred and the existence of that belief is recorded, in writing, in the internal records of the Customs Service. This provision, when adopted, will put to an end the Customs Service's blanket attempts to disallow prior disclosure.

Fifth, I wish to point the Subcommittee's attention to what seems to be a growing practice affecting commercial import activities. It may be summed up under one word: detention. There are numerous instances in which the Customs Service plays a game of wait and see or a modified form of cat and mouse. Merchandise is not permitted entry. By the same token, it is not seized or refused entry. It is simply detained pending the resolution of what is generally an unknown problem. Under section 107 of the Pease-Frenzel Bill, rules would be established covering those situations in which an entry had been filed but not accepted for release or seized by the Customs Service within five days after the date of entry. The provision would require issuance by the Customs Service of a notice to the person whose merchandise had been detained of the initiation of the detention, the reason for the detention, the anticipated length of the detention and the nature of any information, which, if it could be furnished, would help resolve any open issues. To the extent that the detention had not been resolved within thirty days, the party adversely affected could take the matter into court for judicial resolution. The Joint Industry Group recognizes that there may be refinements needed to this basic concept, however, the most important thing is that there be some specific statutory direction as to how to handle matters which are presently sent into ill-defined limbo.

As a final observation, the enforcement mission of the Customs Service can only be achieved through the voluntary compliance furnished on a daily basis by the commercial sector. Contrary to the views expressed by a former Commissioner, not all importers are crooks. Quite the contrary exists. The Joint Industry Group represents that broad segment of the importing community that is committed to enhancing compliance with the Customs laws. We are encouraged that the oversight function is working since we believe this will help foster increased communication between the Customs Service and the importing public. From this will result better compliance and more effective enforcement.

STATEMENT OF ROBERT HARDY, NATIONAL DIRECTOR, INTERNATIONAL TRADE AND CUSTOMS SERVICE PRACTICE, KPMG PEAT MARWICK, JOINT INDUSTRY GROUP

Mr. HARDY. Thank you, Mr. Chairman and members of the subcommittee. I am Robert Hardy and I am currently employed as the national director for International Trade and Customs services for KPMG Peat Marwick.

Prior to that employment I spent 23 years in the Customs Service, and among those years, I was the originator of the regulatory audit program and served as district director and a number of other positions.

The regulatory audit program was originally conceived as an answer to some of the responses received from the importing community in those days back in 1973, of abuses by certain members of the Customs enforcement organization. And it was a response to that, that was met by establishing an audit organization which would provide the Customs Service a new means of looking at importers' records to determine the admissibility, the correct valuation and, indeed, other information that would be provided then to the decision makers, primarily the import specialists and drawback liquidators, and district directors of the Service.

The auditors were conceived as a group of professionals that all came with academic credentials which supported their ability to conduct audits of financial affairs, as they related to the Customs Service.

The purpose of this, as I mentioned, was to provide additional information and to defuse the atmosphere at that time that existed where one was either importing properly or one was in a fraudulent situation under investigation by the office of enforcement.

Today the regulatory audit program is a viable part of the commercial operations and indeed, is a growing organization which serves a real need in meeting their responsibilities. The difficulty that is being experienced today by the importing community is the overextension of the auditor's authority into areas about which they may not have sufficient credentials or experience to offer opinions or even pass judgments.

For example, in their role as fact gatherers they will develop information to determine the correct Customs valuation that would be determined by import specialists. At times, auditors have overstepped this boundary and moved into areas where they, themselves, have attempted to appraise the merchandise coming into the United States and obviate the built-in control procedures that makes the import specialist the deciding officer for this role.

In the area of drawback which is probably more volatile than most areas of Customs operations because Customs is rightly concerned about giving away money. In this concern, the audit role has been extended at times, to give the appearance that the claimant of legitimate drawback refunds are operating in a way that does not meet all of the rules and regulations of the Service.

Indeed, if that is the case, then certainly the funds ought not be paid. But what we are finding, and what I find with discussions with many clients, is that a company will have been successfully submitting drawback claims and even have had those claims audit-

ed in past years. They are performing the same kind of manufacture operation, keeping the same books and records, and then have an auditor follow several years later—this has been only in the recent years that it has come to my attention—auditor then would determine that the records supporting the drawback transaction were insufficient to warrant the payment of the claim.

The importer and exporter is then in a position of wondering just what records are going to be sufficient for Customs use. On the one hand, we have an audit say that was completed for example in 1987 where the importer and exporter got a clean bill of health form an audit organization, and then a few years later a subsequent audit, looking at the same manufacturing process, looking at the same books and records, is deemed unacceptable.

This leaves the importer in a quandary. Legitimate funds that should be returned to the exporter are suddenly called into question and the entire drawback process which is designed to encourage the export of materials from the United States, the entire process becomes compromised and indeed becomes a source of more Customs complaints, I am sure, to members of this panel, and certainly to groups such as ours.

After having spent 23 years in Customs I do not feel comfortable in the position of throwing stones, but rather, we would feel much more comfortable in suggesting recommendations to enhance the regulatory audit process. I think in that role the area of professional audit standard ought to be reimposed on the regulatory audit division. Indeed, the current managers of that group are very much aware of this and are attempting to make a return to the standards for audit that are put forward by the General Accounting Office in what is known as their yellow book.

In that book there are requirements not only for the method by which the audit would be conducted, but also a procedure that ought to be followed, not just as a matter of courtesy but certainly a matter of professional care.

These would include the requirement for a preaudit conference with the company to be audited. During this conference there should be discussed those things which will define the scope of the audit, and it would give the importer an estimate of the time that the audit is going to be required and provide to the importer a listing of those kinds of documents that would be necessary to support the audit and complete it in an expeditious manner.

Also at the conclusion of the audit, there should be according to the GAO and professional audit standards, there should be a closing conference. At that time, that conference should encompass issues raised during the audit, commonly known as audit findings, recommendations for improvements. This then gives the importer time to correct the matters that are brought to their attention, and indeed, accomplish the objectives of the Customs Service by assuring compliance to the very laws that the audit may have found were not being adhered to correctly.

And finally, the conclusion of an audit ends with a report, and oftentimes today, the reports of audits are not being furnished to the importers, to the point of absurdity, because it keeps them in the dark, and they cannot take proper corrective action. The entire audit process then remains in limbo for some period of time, and

only through application through the Freedom of Information act does the importer then obtain access to the report.

I think this is wrong, and it is certainly not a professional approach. It is something that should be changed.

With respect to the Customs Service workload that the Commissioner mentioned earlier, and how we can see a doubling of the audit workload in the fairly near future, the number of regulatory auditors ought to also be reexamined for a growth in their numbers as well. It is inconceivable as a Customs officer, for me to imagine that the number of inspectors and import specialists could ever be commensurate with the increase in importations and exportations that we see arising through international trade.

The audit process provides to Customs a look over a longer period of time for more transactions through their methods of sampling transactions to provide assurance to the Customs Service that the affairs of the company under audit are being conducted in good or poor order. And I think the committee ought to take into consideration for future use that the number of auditors ought to be enhanced so that they can meet the needs of both Customs and the importing community.

I am confident that regulatory audit is currently in good hands. Certainly with the statements by the Commissioner this morning and knowing the Assistant Commissioner of Commercial Operations very well and the new director for regulatory audit, I know these people very well and I know that they are going to be attacking these issues and in many of these we are in full agreement.

I would like at this time, to thank the committee for hearing these statements and I will be available for questions.

Now, I will be turning this over to Mr. David Rose.

STATEMENT OF DAVID ROSE, CHAIRMAN, ENTRY PROCEDURES SUBCOMMITTEE, JOINT INDUSTRY GROUP AND MANAGER, IMPORT-EXPORT AFFAIRS, INTEL CORP.

Mr. ROSE. Thank you, Mr. Chairman for allowing me to present the views of the Joint Industry Group on a matter of great importance, namely streamlining the U.S. import process through automation procedures.

As chairman of the Joint Industry Group committee on Customs entry procedures I note that our members see a highly positive correlation between automation and productivity. Automation has allowed industry to reduce paperwork, avoid needless replication of data, communicate faster and generally improve the production of goods and rendering of services.

U.S. Customs has also recognized the benefits of automation. Since the introduction of the automated commercial system ACS, in 1984, Customs has much to its credit launched automation initiatives designed to expedite the release of cargo through Customs, replace paper with electronic transactions, check entry status and much more. The Joint Industry Group believes that the objectives of the ACS programs are fundamentally sound and should be pursued energetically and responsibly.

Failure to pursue such objectives will have negative consequences for the U.S. Government and the private sector alike.

Without viable automation procedures, U.S. Customs will ultimately not be able to handle its rapidly increasing work load without dramatically increased resources. To the extent that it cannot do so, U.S. importers will encounter more frequent shipment delays and related increases in cost and a host of other problems.

At the same time, Customs automation programs will fail if they are managed improperly. Representative Pickle's Oversight Subcommittee report indicates that ACS can be improved by strengthening accounting controls, improving training of Customs personnel and administering ACS program in a way that does not cause private sector users to bear unnecessary costs.

We concur with these findings and believe that a properly managed automation program should be firmly grounded in a number of principles. First, Customs field personnel, and the business community, must be adequately trained to ensure that information and guidelines regarding automation techniques are mutually understood up front. This encourages compliance and improves the effectiveness of Customs enforcement.

Second, automation procedures should be based on a concept which treats import transactions as a part of a process occurring over time rather than solely as discreet events. Inherent in this approach is the periodic submission to Customs of entry information, classification value, origin and other data elements. Under this procedure entry information would be accumulated by an importer over time and submitted to Customs at the end of a prescribed period. We note that periodic entry has been used by the UK, West Germany, and other European countries in the processing of high-volume and often complex imports for several years, and this has been remarkably successful in cutting administrative overhead related to import processing. It is high time for the United States to catch up with our European trading partners in this endeavor.

Other important principles include minimizing intrusion of Customs programs on business operations, retaining human elements in import transactions, for example, through toleration of mistakes of fact, and nonintentional errors, and making automation programs optional rather than requiring them. And by making sure that automation procedures benefit both Customs and importers.

The above principles form the basis of a Customs bill that was introduced yesterday by Congressmen Pease and Frenzel under the title, Customs Informed Compliance and Automation Act of 1990, H.R. 4689. The bill provides statutory authority for implementation of a national Customs program that creates the following options: periodic entry, periodic payment of duties, electronic retention of all records in a centralized location for both Customs brokers and importers and use of electronic signatures in all facets of import transactions.

The bill also requires U.S. Customs to test remote filing, a program which permits entry information to be submitted at any Customs location regardless of the port of entry or final destination of goods, and to implement one-stop quota processing, preapproved release of low-risk shipments, filing of entry data in advance of shipment arrival and other procedures.

In sum, the Joint Industry Group believes that this program will provide substantial benefits to both Customs and importers, includ-

ing paperwork elimination, speedier Customs clearances, greater uniformity of Customs treatment and corresponding reductions in administrative costs. We also believe it will create a firm foundation for properly managed automation procedures.

For these reasons, we urge enactment of the Customs Informed Compliance and Automation Act of 1990 at the soonest possible date. In closing, I note that a more detailed statement of my remarks is on record with this committee and I want to thank you, very much.

[The statment of Mr. Rose follows:]

STATEMENT OF DAVID ROSE, CHAIRMAN OF THE JOINT INDUSTRY GROUP ENTRY PROCEDURES SUBCOMMITTEE AT A HEARING ON THE COMMERCIAL AND TRADE OPERATIONS OF THE U.S. CUSTOMS SERVICE BEFORE THE SUBCOMMITTEE ON TRADE IN CONJUNCTION WITH THE SUBCOMMITTEE ON OVERSIGHT, HOUSE COMMITTEE ON WAYS AND MEANS MAY 2-3, 1990

Thank you Mr. Chairman for allowing me to present the views of the Joint Industry Group on a matter of great importance--namely, streamlining the U.S. import process through automation procedures. The Joint Industry Group is a coalition of over 100 members consisting of manufacturing firms, trade associations, and other business and professional firms concerned with Customs matters. Together, our members vigorously support a bill about to be introduced by Congressmen Pease and Frenzel authorizing the Customs Service to move to a full national automation program based on options and informed compliance. This bill is entitled "The Customs Informed Compliance and Automation Act of 1990."

As chairman of the Joint Industry Group Subcommittee on Customs Entry Procedures, I note that our members see a highly positive correlation between automation and productivity. In fact, some of our members have played, and continue to play, pivotal roles in the development of the hardware and software which has made it possible to convert information into electronic form and thereby escape the physical constraints of other media.

Our experience is that use of automation within industry is growing rapidly. It can now be found in operations involving freight tracking, invoicing, purchase orders, shipping notices, material release orders, sales and marketing quotation, quality and safety documentation, and mail and phone messaging. This has allowed industry to reduce paperwork, avoid needless replication of data, communicate with far greater rapidity and predictability, and greatly improve record keeping. The result: industry has been able to become much more productive and competitive.

U.S. Customs has also recognized the efficiencies to be gained from automation. The Customs automation process, which began formally in 1984 with the introduction of the Automated Commercial System (ACS), has resulted in programs that are designed to expedite the release of cargo through Customs, make release times more predictable, eliminate collection of redundant information, replace paper with electronic transactions, increase access to entry status information, and much more. While the management of ACS has been correctly brought into question in Representative Pickle's Oversight Subcommittee Report on Customs Commercial Operations, the Joint Industry Group believes that the objectives of ACS programs are fundamentally sound and should be pursued energetically and responsibly.

Failure to pursue such objectives will have negative consequences for the U.S. government and the private sector alike. Without viable automation procedures, U.S. Customs will ultimately be unable to handle its workload without dramatically increased resources. This fact takes on considerable importance when one considers that the volume of U.S. imports is expected to double by the year 2000. To the extent that Customs cannot properly fulfill its charter, U.S. importers will encounter more frequent shipment delays and related increases in shipping costs.

At the same time, Customs automation programs will fail if they are managed improperly. The Oversight Committee Report indicates that there are a number of areas where ACS can be improved. Specifically, the report finds that accounting controls can be strengthened, training of Customs personnel can be improved, and ACS programming can be administered in a way that does not cause private sector users to bear unnecessary costs.

We agree with the Pickle Report finding that ACS is flawed. In fact, some Joint Industry Group members have experienced delays, rather than time savings, in the release of merchandise under the ACS regime. This clearly runs counter to the intent of automation and must be corrected.

The Joint Industry Group believes that a properly managed automation program must be firmly grounded in a number of principles. First, emphasis must be placed on the training of Customs field personnel and the business community to assure that information and guidelines regarding automation techniques are mutually understood. A program that provides importers with necessary training prior to the implementation of a particular program constitutes sound management. Moreover, this approach encourages compliance and improves the efficiency and effectiveness of Customs enforcement.

Second, automation of the import process should be based on an "account-based" concept of import transactions, viewing them as part of a process occurring over time, rather than solely as discrete events. Inherent in this approach is the periodic submission to Customs of entry summary data (e.g., classification, value, origin and other elements). Under this procedure, the release of merchandise would continue to be recorded as a discrete activity. Entry summary data covering such releases, however, would be accumulated by an importer over time and submitted to Customs at the end of a prescribed period. Importers opting to use this procedure would be subject to audit by Customs on a routine basis. We note that periodic entry has been in place in the U.K., West Germany and other European countries for several years and has been remarkably successful in cutting administrative overhead related to the processing of imports. It is high time for the U.S. to catch up with our European trading partners in this endeavor.

Third, automation techniques must be as non-intrusive as possible

with respect to the normal flow of business operations and the privacy of corporate data banks. We recognize that there is a mutual need to check, audit and confirm that the data transmitted from an importers's terminal has arrived at U.S. Customs without error or alteration. Yet the extent to which we should have access to information in the Customs' electronic files--and the corollary question of the extent to which the Service should be able to audit our files--need a great deal of cooperative effort if all concerned are to be confident that the result is accurate, well-managed and properly protected data.

Fourth, the human elements involved in import transactions must be considered. Our experience demonstrates that automation does not eliminate human error, it merely permits that error to be transmitted at inhuman speeds. We therefore believe that a customs automation program must allow for mistakes of fact and other non-intentional errors; moreover, it must facilitate error correction, particularly at the early stages of development when inexperience will be a mutual characteristic. Equally important, ACS instructions should not override the judgment of Customs officials. For example, ACS flags calling for intensive examinations of particular imports should not be sweepingly applied to merchandise known by Customs officials to be low-risk.

Several other principles must also be considered in the implementation of automation techniques. These include:

- o Options and modules. Users should be able to select the automation modules they wish to use, based on a menu of options.

- o Non-discriminatory treatment. Importers and their brokers should not be penalized for their lack of participation in the program. In particular, Customs should avoid negative reinforcement to compel parties to use automation.

- o More efficient use of resources for both Customs and importers. Automation should not be weighted in favor of either of these sectors.

The above principles form the basis of the Customs bill about to be introduced by Congressmen Pease and Frenzel. The bill provides statutory authority for 1) implementation of a National Customs Automation Program and 2) appropriations which support its implementation. Such a program carries the potential for streamlining trade on a revolutionary scale for both government and the private sector alike. Substantial mutual benefits to be derived from this program include paperwork elimination, speedier customs clearances, greater uniformity in the application of customs requirements, and corresponding reductions in administrative costs.

The Pease/Frenzel bill will provide authority for the following options:

- o Periodic Entry, as provided below:

  "To streamline the Unites States import entry process by presenting an import activity summary report to the U.S. Customs Service on a periodic basis, in lieu of presenting import entry documentation on an individual shipment basis."

- o Periodic payment of duties.

- o Electronic retention of all records in a centralized location for both importers and customs brokers.

- o Use of electronic signatures in all facets of import transactions (release, entry summary, affidavits, etc.).

The bill will also require U.S. Customs to:

- o Test remote filing in a manner that, to the extent feasible, includes all aspects of the import entry process. Remote filing would permit entry information to be submitted at any Customs location irrespective of the port of entry or final destination of the goods.

- o Implement electronic payment, one-stop quota processing, preapproved release of low-risk shipments, filing of entry data in advance of shipment arrival, and uniform application of customs rulings and regulations.

In conclusion, the Joint Industry Group supports Customs automation procedures which are as non-intrusive as possible and produce tangible results to both government and industry in the streamlining of import transactions. We believe that investing in automation now will have a substantial long-term payoff for both sectors. At the same time, we recognize that a successful automation program depends on well-conceived and properly managed programming and procedures. The Customs Informed Compliance and Automation Act of 1990 to be introduced by Congressmen Pease and Frenzel will provide a firm foundation for achieving these objectives. Accordingly, the Joint Industry Group urges its enactment at the soonest possible date.

Thank you again for the opportunity to appear before this committee.

Chairman GIBBONS. The panel has made some good suggestions here and let me say that it is my personal hope that we can move very rapidly on this. I would like to speed up the consideration of it. I am waiting out of courtesy for the administration to bring forth its proposal, but we do not intend to wait very long

The way that this legislative session is breaking out it looks to me that we are going to have more time to work on matters like this and I would like to accelerate what you have suggested here. So if there are any members of the administration, I would like them to take note to please get word back that we are going to speed this process up and not slow it down. And I am interested in what can be done.

As I told the Commissioner, I want every nickel collected that is due. I do not want an extra nickel collected if it is not due, I want strict accountability for all money that is collected, and I want to see the law being enforced. If there are ridiculous and stupid things in the law that ought to be taken out, let us know and we will try to get rid of them as rapidly as possible. Your suggestions here today were very constructive.

The national entry processing system, I assume all of you support that, is that correct, or am I wrong?

Mr. KUMM. That is correct.

Chairman GIBBONS. All of you support that?

Mr. KUMM. Yes, sir.

Chairman GIBBONS. Detention of merchandise, what is this? Is this arbitrariness on the part of some inspectors or is it a lack of personnel or vague laws or what is the problem?

Mr. OUTMAN. Mr. Chairman, it is a situation that I think is at the beginning well-intentioned. In other words an import specialist needs some information or has a question. We have found certain areas where there is the potential for abuse, things are not just going right so that the merchandise is not accepted, it is not rejected and the Customs Service does not move to seize the merchandise because they know they just will not have the grounds for it.

In the most recent pronouncement in the area of the 596 seizure authority where heretofore Customs has been seizing stuff right and left, they have now suggested that if there is a question about overages on textiles or overages on steel, that they will go into some ill-defined period of detention where the importer can make a head count, can get rid of the bad and try to enter the good.

And detention is just something that is not being addressed. This is why in the Pease-Frenzel bill we have set forth a mechanism where there will be a 5-day period of time in which the Customs Service has to bite the bullet—it either permits entry or it seeks to stop the merchandise from entering.

If not, it has to issue a notice of detention and that starts then a 30-day clock running, at the end of which if things are not yet resolved, the importer or the party aggrieved would have the right to go to the Court of International Trade and say to a judge, enough is enough, let us get this thing resolved.

So it is an attempt to try to find out what is at issue here. But some detention seems to be merely to try to get additional information but others seems to be a means of well, I am going to hold you up until you come around my way.

Chairman GIBBONS. Mr. Pickle, do you have questions for this panel?

Mr. PICKLE. No, Mr. Chairman, except to say that I am pleased to know that your intent is to expedite these hearings and recommendations. And this panel has given us a lot of good suggestions and many of them are paralleled in the report of the committee.

If you have got any specific recommendations that you want to make to us, I wish that you would follow through with it, particularly in view of the Commissioner's comments and testimony this morning. Time may be important so that as quickly as you can get any further recommendations to us, that will be helpful, because I hope we can speed it up.

I thank the panel.

Chairman GIBBONS. Mr. Frenzel, would you like to inquire?

Mr. FRENZEL. I thank you, Mr. Chairman. I want to thank all of the witnesses for their testimony and to thank the Joint Industry Group for its counsel over the years. I do recall that when we got into the old 592 problem, how helpful this Joint Industry Group was in providing what was, at least in my time in Congress, the only real Customs reform bill of any comprehensive nature that we have passed.

It now appears that we have swept together enough debris to require another bill that is not as perhaps equally comprehensive but at least pretty broad in scope to take care of some problems, which probably should never have arisen in the first place if we had a reasonable attention to duty by the Service.

But perhaps in this complex world we would have had the things that needed to be cleaned up anyway. I think that when the Service begins to do strange things like not having a habeas corpus law regarding merchandise that has been snitched from the stream of commerce and when importers are obliged to file a Freedom of Information Act request to get things that ought to be available in some kind of an open democracy like our own, when we use fraud to, as a weapon to intimidate people who have made simple mistakes and when we use drug seizure authorities on items that have no relationship to that sort of thing, it is about time to get to work and straighten it out.

I think you have given us a good agenda. Mr. Pease and I have tried to be responsive. We do not mean to be dogmatic. If there are good arguments why things that are in that bill should not be in there, we would be glad to modify them. If there are good arguments to put more things in there that require work, we are anxious to do that.

But in general, we think you have given us a great start and we are very appreciative of your testimony and of your good work that put all of this together.

Chairman GIBBONS. Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman. I, too, would like to thank all the members of the panel not only for their excellent testimony this morning but also for a great deal of work that went into the preparation of the suggestions which are now incorporated in what will go down in the annals of history as the Pease-Frenzel Customs reform bill. There is a longer title, but it escapes me.

In any event, I am very pleased to hear the comments of Chairman Gibbons that he would like to accelerate this process. My hope is that we can have a hearing in the subcommittee some time soon, ask for specific reactions to our bill, ask for any other comments that outside groups might have, and then proceed to mark up the bill, and then see if we cannot get this adopted in this session of Congress.

In anticipation of complaints that others have, I might just ask a question or two. The next panel will be from the broker community, which claims that remote entry is unnecessary. Mr. Rose, why do you feel that it is an idea that ought to be tested?

Mr. ROSE. Well, I think that automation in terms of the processing of imports which to a large extent is an accounting exercise, you are dealing with classification value origin and so forth, tends to take geography out of that process. We are in a day and age now when computers all network together and a computer in New York talks to a computer in Los Angeles and so forth. So the whole process is conducive for centralization. Getting to more specific efficiencies that I would see, let us look at an example, if an importer is located in New York and enters merchandise through San Francisco for inward movement to say, Kansas City and the importer's corporate customs operations are located in New York, the broker can be located in New York, it makes sense to be able to file the entry in New York or in a network situation with computers talking to each other throughout the country, it really does not make any difference.

And I just think to restrict the filing of documentation to this one port does not make sense in this day and age of automation and I think we need to move forward with this kind of efficiency.

Mr. PEASE. Thank you, that should help.

Also the broker community opposes periodic entry. Why do you believe it is necessary?

Mr. ROSE. I believe it is necessary because importers in many cases need time to be able to process information but I am really looking at this more as an efficiency.

If there are hundreds or thousands of imports that are coming across the border and they are high-volume importers and let us take the northern border, for example, with automobile imports, it makes sense to be able to aggregate data over time and rather than make discreet submissions in really small bits and snatches of time, make it over the period of let us say a month.

So what you are really doing is taking away the specific transactions. You still deal with the hands-on release of merchandise where brokers get involved, that is a very real and tangible situation but when you are talking about the accounting process from an automation standpoint to aggregate that data and reduce the number of discreet filings makes a lot of sense.

Mr. PEASE. Thank you.

Mr. Outman, can you perhaps clarify for me and possibly others, how a seizure under section 596 differs from one authorized under section 592?

Mr. OUTMAN. Mr. Pease I think the clearest case would be one that comes to mind because I have got it on my plate at the present time. In an import transaction coming from Mexico into

the United States involving some 17,000 dozen garments they were over-visaed or they had 7 extra garments over and above the 17,000 dozen and I forget what that would translate into in numbers. But the Customs Service seized the 17,000 dozen under authority of section 596. Under 592, they could only seize the seven shirts.

Now, in terms of looking down the barrel of a .357 for example, you can imagine how much more bargaining power you have when your 17,000 dozen under seizure because you have seven shirts at issue. So that would be the most classic difference. It is an in-rem seizure authority under section 596, and take the whole thing. Which was designed, keep in mind as Congressman Frenzel said, it was adopted because of its intent to seize drugs and who wants to parcel out whether you have to take the little pills or the big ones, get the whole thing. So it is a blunder-bluss approach to enforcement and from the importer's perspective or someone who is undergoing a compliance action, you have a whole lot less initiative to be assertive of your rights when your entire economic well-being could hang in the balance.

Mr. PEASE. Is it your feeling that we could do without section 596?

Mr. OUTMAN. Mr. Pease that is unquestionably my feeling, and I think it has been the feeling of the Joint Industry Group and really going back to what Congressman Frenzel mentioned with the 1978 reform we went away from the in-rem seizure, or the Congress did, to in persona, namely get the person, penalize the person for the person's wrongdoing. Do not take goods, and then have the person capitulate. So I would say, yes, we are definitely opposed to going back 12 years in time.

Mr. FRENZEL. Would the gentleman yield?

Mr. PEASE. Certainly, I would be happy to yield.

Mr. FRENZEL. Thank you, Mr. Pease.

It seems to me that we granted authority under one of our many drug wars to the Customs Service with the understanding that seizures or under that section would apply only to the drug materials.

And the Customs Service, which sought that authority, very aggressively understood and agreed with us that that would not be used for any normal Customs seizures, whereupon, Customs simply flouted our intention and what I considered to be their promise and applied it across the board.

Is that too harsh a suggestion? Is that your understanding of what happened or do I not understand what they did?

Mr. OUTMAN. On the theory that reasonable people can disagree, you and I happen to share the same view. But I would note for the committee that Representative Frenzel notes correctly, in the course of the consideration of this, it started out importations could be seized if contrary to law. We pointed out to the Ways and Means Committee staff and then Senate Finance Committee that there is a lot of things that can be contrary to law that have nothing to do with drugs. And we were really concerned in the commercial context. That is why there was added to the provision a parenthetical expression "except in violation of section 592 of the act."

To my knowledge, that has never been read the way it was intended to be read, and it is a question that it is their interpretation

and they feel that they have authority to read it as if it doesn't exist.

Mr. FRENZEL. Thank you. And if the gentleman will yield further, this law was developed in the Judiciary Committee which has the primary responsibility for dealing with drugs. And we had to meet with them to sign off on our jurisdiction. Mr. Gibbons was involved, I was involved, and others, and we didn't have any desire to slow down the war against drugs. But we made quite clear our intention that we did not want to go back to the old days of intimidating importers. And yet that is exactly what happened, at least in my judgment, and we do need to talk to the Customs, and we will be getting their impression of this problem, too.

I think that there has been an intentional deviation from what I perceive to be an agreement between all of us, the Judiciary Committee and the Ways and Means Committee and the Customs Service, on this matter.

Mr. PEASE. I thank the gentleman.

I gather that in the industry there is a good deal of optimism that relations between the industry and the Customs Service are likely to be better, maybe are better and likely to be much better under the new Commissioner than was the case previously. Is that a fair statement?

Mr. KUMM. That is a fair statement, Mr. Pease. There is an openness now that did not exist before. There is a willingness to listen to the practices and listen to the users of the Customs Service, and certainly it is a breath of fresh air, if you will.

However, what we are concerned about is the fact that certain changes still need to be made to protect us from, say, falling back into old practices should the top management change at Customs. We feel that this should be recognized that it has been abused, misused, and so forth, and we would like to make the corrections now while they are still fresh in our memory.

Mr. PEASE. Thank you.

Perhaps I could ask Mr. Hardy about a concern that I have. It is not uncommon in Federal agencies for Commissioners and Secretaries and Directors to come and go, and for those who are there more permanently to continue to run the show. And I have always been apprehensive that people at the top, new appointees, no matter how good their intentions, have a limited ability to affect what really goes on down below the executive suite. Sort of like a tugboat trying to push an ocean liner around.

I guess my further concern is that in some cases the bureaucracy down below actually seeks to thwart new initiatives by the head of the agency.

Now that you are out of the agency, could you look back on your experience in it and give me any judgment at all about how likely the new Commissioner is to be able to carry out the things that she wants to do with the cooperation, or will it be without the cooperation of the people who are there from year to year to year?

Mr. HARDY. Well, I think your concern is very real. However, I would have to say that if we look at the past experience under Commission von Raab, indeed the policies of Mr. von Raab were, in fact, carried out by the rank and file over the 8-year period. And so his ideas became the ideas of those in the service. And, indeed, Cus-

toms has a long tradition of being a very strong law enforcement organization, and the fact that he was reinforcing the long history of the service, and even in a stronger context than had previously been available to the rank and file, career civil servants, it in large measure, I think, played into the hands of those people who did seek a bigger enforcement role.

Indeed, to become a candidate for promotion often meant that one had to be recognized as someone who was going to be strong on law enforcement. So, indeed, the incentive was there to conform to the Commissioner's wishes.

Under Commissioner Hallett, we are seeing a different style, considerably, and I don't want to say deemphasizing of the drug interdiction program because I don't think that's her purpose at all. But it is a reawakening, actually, of the dual role that Customs has historically performed, and that has been, one, that Customs enforces the laws of the Government; and, two, that it plays a revenue and commercial regulatory role as well.

Under Mr. von Raab, the second of these was very much lost in the shuffle. Indeed, as a district director, I found it very difficult to manage effectively at times because of the rededication of commercial resources out of commercial operations and into enforcement activities, some of which were really not very feasible at their initiation.

Mr. PEASE. Can I draw from your comments that there is some reason to be optimistic that the civil servants within the Customs Service will adjust and adapt to the new Commissioner's wishes and carry them out?

Mr. HARDY. I think that is entirely up to the Commissioner. The people in the Customs organization are very much going to be following her policies. And as long as she retains the same kind of vigor that she is displaying currently and elevates the commercial side of the customs house to at least a position of equality with the enforcement side. I think the message is going to be very quickly picked up by the members of the Service that, yes, this isn't all just lip service and that, in fact, we are going to be putting commercial operations up to the head of the class as previously.

Mr. PEASE. All right. Thank you very much, again, for your excellent testimony and for your support in working up this legislation.

Chairman GIBBONS. Are there further questions for the panel?

[No response.]

Mr. KUMM. Mr. Chairman, may I make one more comment?

Chairman GIBBONS. All right. Certainly.

Mr. KUMM. Certainly, we welcome the chairman's remarks about the need to move quickly on this bill. That is the highlight of our day. We appreciate those comments, and we look forward to working very closely with your staff.

We also would like, once the administration has submitted their bill, we would like to be able to assist in the evaluation of that and whatever services we can render, we will be available.

Chairman GIBBONS. It appears to me that this session of the Congress for the Ways and Means Committee is not going to be as busy a one as we had perhaps anticipated, and that we can devote more time, more rapidly to this subject. It certainly is time to devote

some time to it. In the next year or year-and-a-half, we are going to be terribly busy with the problems of the multilateral trade negotiation round. So looking forward to the workload that we have, I think we ought to get as much of this behind us as possible this year.

I would like to have, as my personal goal, this bill over to the Senate by the end of the summer, and when I am talking about the end of summer, I am talking about the end of July. That is the congressional end of the summer, and I think that is a good time to aim for. So we will need your help and cooperation, and I am sure the Department of the Treasury will be abler to come through and get their work done in that time.

Thank you very much. This concludes our hearing for this morning. We will resume again at 2 p.m. Mr. Pease will preside at 2 p.m., and I will be in the room as quickly as I can thereafter.

[Whereupon, at 12:40 p.m., the subcommittees recessed, to reconvene at 2 p.m.]

AFTERNOON SESSION

Mr. PEASE [presiding]. The subcommittee will come to order.

We will continue our hearings from this morning. We are going to hear now from Mr. Litman, Arthur Litman, of the National Customs Brokers & Forwarders Association of America.

Mr. Litman, you may proceed.

STATEMENT OF ARTHUR L. LITMAN, PRESIDENT, NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC., AND PRESIDENT, CASTELAGO & ASSOCIATES, LOS ANGELES, CA, ACCOMPANIED BY JON KENT, WASHINGTON REPRESENTATIVE

Mr. LITMAN. Thank you very much.

My name is Arthur Litman and I am President of the National Customs Brokers and Forwarders Association of America. Accompanying me today is Mr. Jon Kent, our Washington Representative.

Customs brokers, as an industry, are those parties that represent importers in dealing with the Customs Service. We act as agents for importers in almost 95 percent of all the transactions that are accomplished with Customs, and as you can imagine, our lives begin and end, or our sun rises and sets along with the Customs Service. So, what happens with Customs is very, very close to what happens with our daily operations, our daily businesses.

We have appeared before this committee many times in the past to give testimony on various areas and we are pleased to be here again today.

It is the feeling of our industry that the time has come again for legislation with the Customs Service. There have been a lot of changes over the last few years that require being addressed by the Congress of the United States. Legislation is ripe now in areas of automation and in many other areas that affect the importing public.

We also think that now Congress must begin the task of assessing the degree to which the Customs' past problems, largely over a

difficult period that we had with the previous Commissioner, can be considered a function of this prior Commissioner or to the degree to which these problems should be addressed more accurately to the laws that confer too much discretion to the agency itself.

The National Customs Brokers Association has been a strong supporter of the automation of the Customs Service. Over the last few years, we have worked very closely with the Customs in the establishment of the Automated Broker Interface program. As Customs has developed and moved into these programs, it has required not just verbal support, but an enormous investment by the members of our industry, a huge financial commitment in electronic equipment, computer programming and personnel support.

I would like to diverge from my testimony and have that placed in the record, if at all possible, and talk a little bit about what is important to us, to try to give you a sense of our industry and those things that have given us our particular position. Central to this is the idea that cargo, as it arrives in the United States, is the subject of the Customs Service; and, that with all the automation and all the changes that we have seen to the Customs Service over the last few years, we have found that one of our key jobs is to continue to keep Customs' attention focused on the fact that automation does not release cargo. Automation only facilitates Customs' ability to choose what cargo they are going to examine, to choose what documentation is going to be examined by Customs, and to make sure that the duties that are paid by the importing public are correct.

I remember over the last few years that the brokers were very involved with Customs and, hence, spent a lot of time developing some of these automated systems that we have seen: the Automated Broker Interface, the early aspects of the early Automated Manifest System, and more and more of these automated programs that they now call ASC, the Automated Commercial System.

Back in 1987, however, we found that there was a revolution in Customs where they had discovered that automation was a panacea for everything that was necessary to make Customs work well. So we spent the next 2 years trying to convince them, again, what automation is good for and really what is important to them, the idea that they want to facilitate the ability of an individual Customs inspector to be able to look at a cargo and not waste their time looking at cargo or merchandise which is not a high risk, and instead look at merchandise which is high risk.

There was a lot of time spent on that. We had a lot of battles with the Commissioner of Customs and, ultimately, they began to look at it in a more serious way.

Now we find ourselves again pulling the reins and this time it involves both Customs and the importing public. Customs has a program that they call national entry processing. You have seen that today. The Joint Industry Group talked a little bit about this in the bill that you cosponsored.

National entry processing is a concept which seems like its time has come. But, our question is whether this is really the time to be addressing such issues with legislation. This is a technical question and it asks simply: Why should not someone removed from the location of cargo be able still to do the paperwork necessary to deal

with that cargo? And our position is—and we considered this very carefully—that it may be possible, that it needs to be studied very carefully, and there are many steps that are required before Customs can make the determination that this is a viable program in its entirety.

For instance, that program includes some components that are very important components, but have yet been thoroughly tested by the Customs Service. The first is the concept which permits the use of electronic invoices—invoices being the documentation which records the transaction itself, gives the details as to what is coming in, the values that are being shown and, along with that, detailed information as to how the transaction was accomplished.

For the past 2 years Customs has allowed us to transmit invoices electronically. Now, we are great supporters of that. We think that is a very important concept. At the same time, however, we also have a number of concerns. For instance, does the Customs Service computer system have the ability to absorb the great volume of invoices that might come in.

We have also noticed that, even though it is a program which seems attractive and one that should have pulled a lot of importers in, currently there are a very limited number of importers that have tested this system. I believe there were one, two, maybe three, altogether in a 2-year period. Yet, this is a foundation of the national entry processing. I think Customs realizes that invoices will be too burdensome to their system if all invoices come in. So they have reasonably looked at a more practical system which would allow partial invoices. And, we support that as well.

They are also looking at a system that involves something called preclassification. This is where an importer may come to the Customs Service with the line of merchandise that they import and work out ahead of time the proper classifications and rates of duty for that merchandise.

The program has a lot of merit. But it also becomes an essential element of national entry processing. Yet, as we have seen so far, there have not been any substantive changes to the automated system to properly take care of the information that is being produced by these preclassification programs. Yet, each of those is required before we can fully automate and employ remote automation.

The last point that I would like to make on that is that not until we have had a chance to adequately test this will we see if it is rational to move the documentation away from the location of the cargo. Inspectors have to look at the cargo at that location. And, it is not an isolated transaction, the Customs transaction, it is a transaction in context with other government agencies, the Food and Drug Administration, Fish and Wildlife, the Department of Agriculture. It involves steamship lines or airlines. It involves inland trucking—there is a whole infrastructure that is built up in each of these port areas. I think that it is very important that Congress take a good look at what happens to these infrastructures if these programs go into effect. We must take this look before we just legislate and determine that this is the way to go.

Two other items that were brought up this morning are important to us, as well: periodic entry and periodic payment. The issue

of periodic entry is one that has been introduced and it is a program that we have seen work well in a very limited area, which involves the auto importers at the northern border. Customs ran a test for a number of years, I think in excess of 20 years, and we think that worked well for that specific commodity. But it is also an idea that has lost its franchise after being tested a number of times in other areas for other commodities.

I think that the Customs Service has looked at this issue three or four times over the last couple of years and each time has rejected it. The reason I think it is being rejected is that, again, when shipments come into the United States, these shipments are distinct units. Notwithstanding what anyone says, when an importer orders goods overseas, they put forward a purchase order. When the goods are shipped to the United States, they are covered by a bill of lading or an airway bill. That bill of lading or airway bill is accompanied by an invoice that shows what is being purchased. This transaction is dealt with as a totality.

The Customs Service recognizes this and so, for the last 3 or 4 years, the development and the directions of the Customs Service has been in a different direction, using other programs as an alternative to periodic entry and periodic payment. They have used "selectivity" as a program for viewing documents. So, currently, we are in the midst of a program which is going to have the effect of limiting the number of documents as they come to the Customs Service. We have paperless release of cargo, which simply means that if the Customs can initially evaluate the information we sent them electronically, then they will choose not to look at large importers' repetitive shipments. This is where they have looked at one or two and found that there is not a problem. They simply choose them on a selective basis after that.

In addition, we have followup documentation, the entry summary, which is also just beginning to be tested. This is where Customs will determine that they want to bypass certain entries and ultimately have the importing public, the importers and the brokers merely retain those documents.

Lastly, Customs has developed a program which just started a couple of weeks ago, which allows for the electronic transfer of Customs duties from the importer's or the broker's account directly into the Customs Service. Our feeling, as an industry, is that these programs do a much better job of addressing the issues brought up by periodic entry and by periodic payment than these older ideas. We are concerned that what is happening now maybe what we saw back in 1987 with Customs. Everyone looks at the wonders of automation and they begin to have their own ideas of how things should go. Instead, they should allow the Customs Service programs to mature. We should see how those programs work before we begin to take these kinds of issues into the legislative arena.

The last thing I would like to point out is, in coming here I do not want to appear that I do not support the Joint Industry Group's positions. We are great supporters of the Joint Industry Group and believe that the vast majority of the items that they have brought forward are very good legislation. We strongly and actively will support that. It is just in these three areas where we have differences.

You will also note that the testimony that I have presented in writing goes into detail on a great number of other issues. These are issues that have been presented by Customs as ideas that they feel may be worthy of legislation. Just to mention one or two, I should point out that we support Customs' position to eliminate the law that requires that they look at 1 out of every 10 packages. That is not practical, nor is it an efficient use of Customs personnel.

We also support the elimination of the concept of informal entries for low-value merchandise. The reason for that is that the electronic system of communicating with Customs is so efficient that it works better to deal with everything as a totality, as one class of commercial merchandise, as opposed to basing on whether the value is $250 or $1,000 or $50,000.

I want to thank you very much for your time, and I would be pleased to answer any questions you might have.

[The statement of Mr. Litman follows:]

TESTIMONY OF ARTHUR L. LITMAN, PRESIDENT NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

Mr. Chairman: I am Arthur L. Litman, President of Castelazo & Associates of Los Angeles and President of the National Customs Brokers and Forwarders Association of America (NCBFAA). We know that you are well acquainted with our industry, so suffice it to say that we are the industry that facilitates the commercial transactions between the importing public and the U.S. Customs Service. In almost every element of our business as customs brokers, Customs laws and regulations impact the conduct of our business. Ours is the highly detailed business of filing entries, paying duties and expediting release of cargo and we are attuned to virtually every change in the customs law affecting commercial operations.

That is why we are so interested in the monumental task you have charted for the Subcommittee. The time has come for comprehensive Customs legislation, particularly now that Customs business has entered the new world of automation. But it is more than simply needing to update the law to acknowledge the presence of computers. Congress needs to review Customs' plans for the future and provide policy guidance for the systems that will profoundly affect the conduct of commerce and viability of our nation's ports. And, finally, we have come through a very difficult period at Customs where conflict with the commercial sector was the norm and where excesses and abuses of power occurred all too frequently. Oversight subcommittee chairman J. J. Pickle and his colleagues have done an outstanding job at analyzing how a federal agency can go awry. But now there is new leadership at Customs -- from first impressions, very excellent leadership. Acknowledging this, we must begin the task of assessing the degree to which Customs' past problems were a function of its Commissioner and the degree to which they can be more accurately ascribed to laws that confer too much discretion to the agency. We have attempted to address all of these and are eager to share our views with you.

* * * * * * * *

NCBFAA supports a transition to a balanced electronic environment. It was indeed Customs' foresight and energy that stimulated this revolution -- the elimination of paper as the medium for each transaction and its replacement by the Automated Commercial System (ACS). Customs brokers have embraced automation and become wholeheartedly involved. That involvement amounts to more than simply the participation of the individual Customs broker in the Automated Broker Interface (ABI). It has amounted to a huge financial commitment in terms of computer hardware, software and manpower. Our industry has had to keep pace with evolving technologies and new programs. Whenever Customs has introduced a new concept, this has had immediate ramifications for ABI brokers.

ABI especially has evolved through the cooperative efforts of both Customs and the brokerage industry. Often we have objected and won. Sometimes we have had to concede. And then finally there are those occasions -- often in the broader context of the umbrella ACS program -- where Customs' automation dreamers have concocted programs whose implementation is counter-productive. It is vitally important to draw distinctions here -- to recognize where automation has brought us and where, on the other hand, it need not take us.

The ABI program has so far been a success. That has come as the result of three steps: fielding a sound concept; ironing out the "glitches"; and, refining the program to achieve greater efficiencies and real benefits to both Customs and the importing public. This is a process that calls for discipline. It is reiterative. It is focussed. And, it is painstaking in its detail and the patience that it demands. This is where Customs

and the customs broker industry have been at their best. This is the yet unfinished task that will consume our energies for still more time to come.

At the same time, though, impatience and the allure of new concepts must be met with a measured response. Chairman Pickle has rightly pointed to this inclination at Customs and urged a "go-slow" approach. We have echoed this warning in previous appearances before the committee. Customs futurists see possibilities for new ideas in automation and, rather than plotting out their role in the context of present initiatives and the timing for introduction, the agencies rush pell mell towards immediate testing and implementation -- sapping current projects of the much needed resources that existing projects require for completion. Then, later and often inexplicably, nothing more is said, their energies are refocussed to another new concept and Customs is left with yet another novel idea withering on the vine.

National entry processing (NEP) may just be such another "flavor of the month." It is an idea whose time may eventually come, and then again it may be an idea that will be overcome -- overcome by less burdensome and more easily administered programs. Viewed in a vacuum, in an automated world where component systems are operational and running as part of an integrated whole, the notion of a centralized entry and release system has appeal. Why not have a customs broker in Denver handle all an importer's transactions in Miami or New York or Houston or Los Angeles? NCBFAA takes the concept seriously and does not dismiss the idea lightly. Yet, it is not practical <u>now</u>. Much remains to be accomplished elsewhere with ACS. NEP is not an instant-start program, but depends on foundational elements that must be put in place first and given a chance to function. Two such examples are the Automated Invoice Interface (AII) and Electronic Data Interface (EDIFACT). Both were announced amid great fanfare but, as Customs rushes past them to promote NEP, neither has proven to be fully operational. Customs does not have the resources to explore NEP and, at the same time, give the necessary commitment to ACS.

Another lesson that Customs must learn is that entry processing is not simply an abstract series of numbers and actions. It has real world dimensions -- this is real freight, moving through real ports, managed by real people. Abstract solutions meeting concrete problems, poorly reconciled, can be an invitation to failure. Its flaws are clear to us. The Customs test of its predecessor, PAIRED, showed that positive results could only come through limiting the system to easy transactions combined with whatever human intervention was necessary at Customs to guarantee success. NEP is oriented only to a few large importers, while the vast majority of the importing public would be excluded for some time to come. NEP is reliant on the smooth flow of cargo at remote locations which, while being the rule, ignores the enormity and frequency of the exceptions. And, finally, NEP could destroy what many members of Congress have spent their careers trying to achieve -- a viable hometown port with an infrastructure requisite to conducting business on an international scale. After all, when the need for a Customs presence, or a broker presence, or a banking presence, diminishes in Chicago or Houston or Tampa, what will your international business be like?

Two other programs that we see as comparable are periodic entry and periodic payment. These envision a consolidation of transactions being filed by an importer and a consolidated payment being transmitted on a periodic basis to the government. Customs has tinkered with this idea for years and been unable to bring the concept to fruition. Importers point to its employment overseas -- such as Britain -- countries which have nowhere near the volume or complexities that we have amassed. NCBFAA opposes

these programs for many of the same reasons: they dilute Customs resources to the advantage of a few, high volume importers and they contemplate a degree of centralization that simply ushers in an entirely new series of difficult problems. Yet, periodic entry and periodic payment suffer from one, common, devastating flaw -- they are completely unnecessary. With the advent of a wholly automated system and the ease with which entries can be filed and duties paid electronically, what possible advantage is there to lumping everything together for processing at the end of the month? Suddenly, consolidation becomes inefficient.

Yet, there is much about Customs automation plans that we support and there are many legislative changes that we would like to see. Following are several examples:

(1) Revision of outdated statutory language oriented to paper rather than electronic transmission. NCBFAA supports authorizing the use of full or partial electronic invoices. We favor development of an electronic signature to replace the old concept of handwriting on paper. NCBFAA supports permitting manual or electronic filing of entry and entry summary.

(2) NCBFAA supports voluntary centralized storage for both electronic and paper records.

(3) NCBFAA supports removal of the requirement to examine one package out of each ten packages in a shipment. There are simply insufficient resources at Customs to meet such an arbitrary requirement. Alternative methods for assessing cargo risk -- "selectivity" -- promise a more efficient technique for designating cargo for examination.

(4) NCBFAA supports special reconciliation procedures where necessary to allow subsequent adjustment for assists and other adjustments to value. That language must be narrowly drawn and limited to continuation of present administrative practices.

(5) NCBFAA proposes elimination of the concept of informal entries for commercial shipments. In a fully automated environment, there is no reason to perpetuate a second system outside the mainstream of Customs commercial operations.

(6) NCBFAA supports a proposal of the Joint Industry Group to broaden the scope of clerical errors and omissions to those involving inadvertent classification errors and those repetitive errors that can result from electronic transmission.

There are also Customs proposals that we would seek to modify:

(1) NCBFAA acknowledges that notice of liquidation can be efficiently accomplished through electronic transmission. However, official notice of liquidation should not depend on the ABI system and its electronic notice to the broker alone. The courtesy notice, in a paper mode, direct to the importer should be required as a second form of official notice.

(2) NCBFAA is likewise concerned about a similar proposal involving the printed notice of suspension and would have legislation requiring Customs to continue to notify the importer through printed notice. And, Customs must also be required to state valid reasons for the extension in both instances.

(3) NCBFAA wants to ensure that proposals providing for electronic notification of release of cargo explicitly provide for notice going to the broker along with the importing carrier.

* * * * * * * *

Mr. Chairman, a second area for your committee's consideration are the more substantive changes in Customs law. On the one hand, recommendations may be prompted by the Customs Service in an effort to streamline their own operations. On the other, they may represent the observations of the private sector and the Pickle investigation about how to correct for problems encountered during the past Administration. In all events, these changes must be carefully scrutinized. We believe the latter proposals -- those of Chairman Pickle and the private sector -- can stand the test of this scrutiny. In a great number of instances, however, Customs' cannot.

As an illustration, it may be useful to consider a few:

(1) NCBFAA supports the JIG proposal to explicitly clarify the definition of fraud, gross negligence and negligence. Ours is a definition that has evolved over many years of usage in customs law. Customs however has attempted to revise the definition of fraud through its regulations and remove the requirement that the violations be deliberately done, with an intent to violate the laws of the United States. This would blur distinctions between degrees of culpability and provide Customs with enormous leverage -- an unfair advantage -- in dealing with Customs violations. It offers a potentially powerful weapon and an invitation to heavy-handed enforcement techniques. This committee recognized this in the 1987 Trade Bill report, but Customs persists in seeking the change.

(2) NCBFAA wishes to direct the Committee's attention to a broker proposal to create a small claims court for low value issues. While not in this committee's jurisdiction and requiring another committee's action, it has been a great cause of concern to our industry. There is a clear need to provide a speedy and inexpensive forum in which to afford importers and their agents a just resolution of disputes involving less than $5000. Present avenues of redress provided by the Customs Claim Act of 1980 have required turning to courts where the costs of drafting and filing pleadings and of complying with discovery have, in effect, made judicial review too costly to be practical. We therefore propose a small claims tribunal and ask that this committee recommend such a proposal favorably to the Judiciary Committee.

(3) NCBFAA particularly endorses Chairman Pickle's finding that Customs enforcement techniques have created great destruction and loss to many importers. An example cited of Customs destroying a hand-carved teak elephant with chainsaws in an unsuccessful search for contraband is not farfetched. NCBFAA therefore supports a proposal to compensate importers for damages occasioned in the course of an examination through the carelessness of overzealous Customs examiners.

(4) NCBFAA adamantly opposes Customs' proposals to change the drawback laws so that American exporters have reduced access to the program. Reducing the time period from 5 years to 3 years is an overreaction to the administrative task of retaining drawback records. Customs needs to seek more appropriate constructive

Audit Recommendation Activity

October 1, 1989 through April 30, 1990

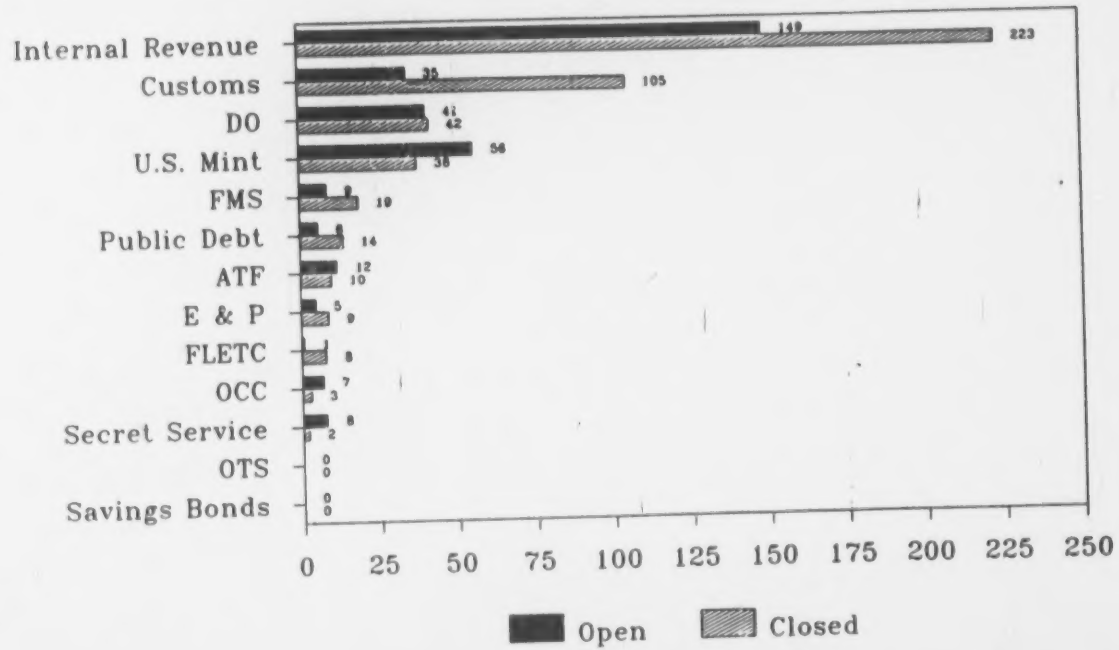
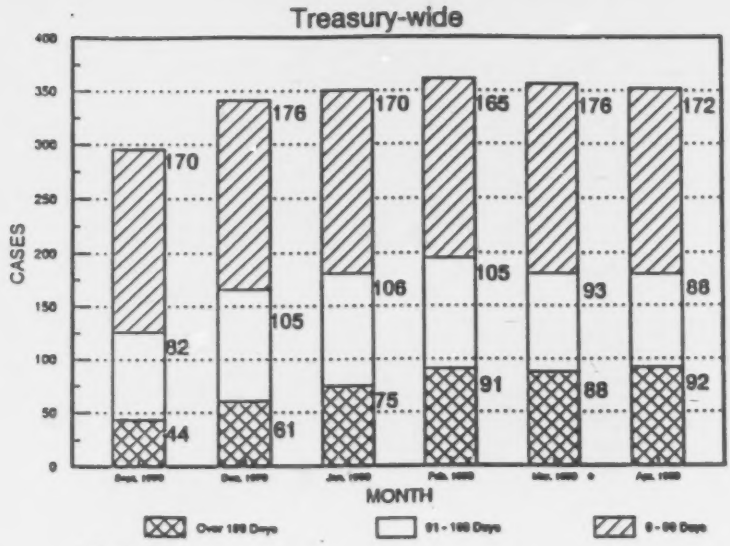
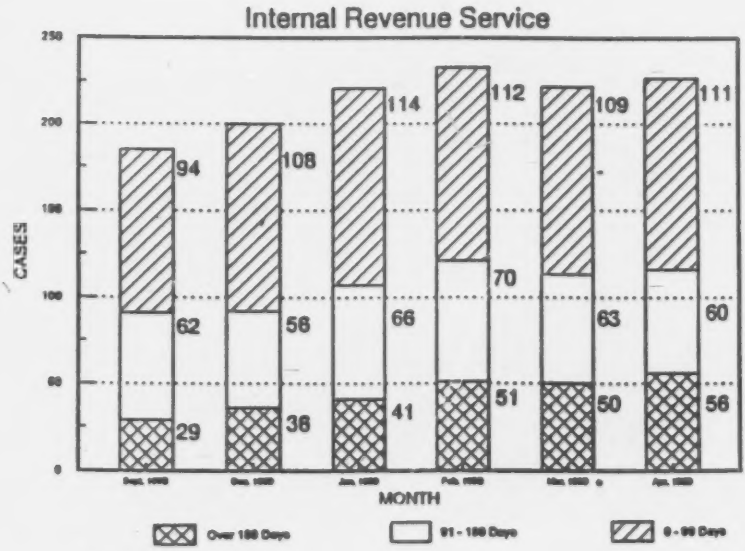


Chart C
(1 of 2)

Pending Actions on Internal Investigative Cases Under Management Control



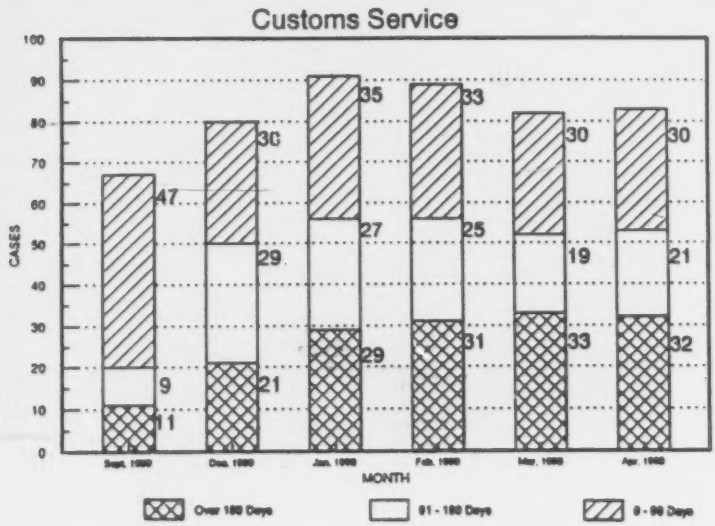
* Corrected



* Corrected

Chart C
(2 of 2)

Pending Actions on Internal Investigative Cases Under Management Control



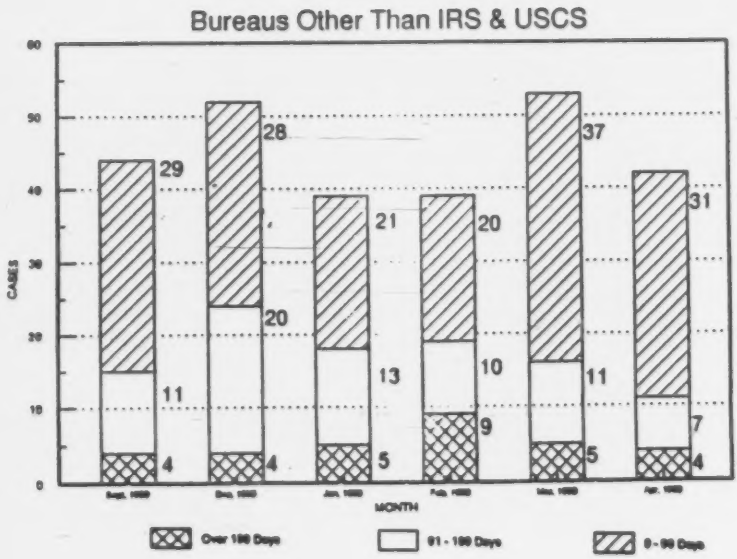


Chart D

Audit Recommendation Status
Monthly Data Report
April 1990

Bureau	Beginning of the Month Open Recommendations	Recommendations Added During This Month	Recommendations Closed During This Month	End of Month Balance	Year to Date Recommendations Closed
Alcohol, Tobacco and Firearms	13	0	1	12	10
Comptroller of the Currency	7	0	0	7	3
U.S. Customs Service	21	34	20	35	105
Departmental Offices	40	2	1	41	42
Engraving and Printing	5	0	0	5	9
Federal Law Enforcement Training Center	1	0	0	1	8
Financial Management Service	9	1	1	9	19
Internal Revenue Service	149	0	0	149	225
U.S. Mint	46	13	3	56	38
Office of Thrift Supervision	0	0	0	0	0
Public Debt	6	0	0	6	14
Savings Bonds Division	0	0	0	0	0
U.S. Secret Service	0	8	0	8	2

Bureaus are listed in alphabetical order.

Federal Managers' Financial Integrity Act
Monthly Data Report
April 1990

Chart E

Bureau	Unresolved Deficiencies 1/ at Oct. 1, 1989	Total Corrective Actions Required	Corrective Actions Scheduled for Completion this Month	Corrective Actions Completed	Rescheduled for Completion at a Later Date
Alcohol, Tobacco and Firearms	5	6	2	0	2
Comptroller of the Currency	0	0	0	0	0
U.S. Customs Service	33 2/	70 2/	3	0	3
Departmental Offices	10	15	1	0	1
Engraving and Printing	0	0	0	0	0
Federal Law Enforcement Training Center	0	0	0	0	0
Financial Management Service	8	18	0	0	0
Internal Revenue Service	10	20	1	1 3/	1
U.S. Mint	6	8	0	0	0
Office of Thrift Supervision	0	0	0	0	0
Public Debt	6	6	0	0	0
Savings Bonds Division	0	0	0	0	0
U.S. Secret Service	1	3	0	0	0

1/ There is not a direct relationship between FMFIA deficiencies and corrective actions. Usually, FMFIA deficiencies require several corrective actions over periods of time longer than one year to be corrected and completed.

2/ These figures are lower than previously reported as of September 30, 1989 because further review by the Customs Service, and subsequent concurrence by the Department, resulted in the withdrew of several deficiencies and the related corrective actions which were determined to be immaterial or duplicative.

3/ IRS completed an additional corrective action which was previously rescheduled for completion this month.

Mr. ANTHONY. Well, these statistical reports might be good in as much as we continue our oversight functions and they would be helpful and not harmful to the functioning of your agency within its guidelines.

Mr. LINGEBACH. Yes.

Mr. ANTHONY. If you could give our staff additional updates——

Mr. LINGEBACH. I will check on that and I know, too——

Mr. ANTHONY [continuing]. Without giving the copy of the internal report and memo. But if you could at least provide the staff with the essence of your corrective actions and give us some indication of what deficiencies you seek to correct.

Mr. LINGEBACH. Yes.

Mr. ANTHONY. What we are really trying to determine is your level of oversight responsibility. In other words, who is doing what and who has what responsibility so that we can ascertain whether or not aggressive oversight is being performed.

You have heard members of this panel talk about what a runaway agency Customs has become and what a rough agency it is. I do not know if we have broken the bronco or not—to the extent they are willing to work with us—and I guess that is what we are really trying to determine.

I know we are all pleased, and I am personally pleased, with the attitude of the agency and with what we are being told at the present. So, if we could develop a closer exchange of this information on an ongoing basis I think it would be to your benefit as well as to ours

Mr. LINGEBACH. I will check on that.

Mr. ANTHONY. What about resources? How much of the resources are being allocated to Customs oversight or can you answer that?

Mr. LINGEBACH. I am not sure exactly, but I would say it is probably several person years that you want from——

Mr. ANTHONY. If you could conduct a study on this and then give us some estimation of man hours——

Mr. LINGEBACH. Sure, yes.

Mr. ANTHONY [continuing]. Percent of your personnel and costs so that we could understand where and why the breakout occurs.

[The following was subsequently received:]

DEPARTMENT OF THE TREASURY
ESTIMATE OF ANNUAL RESOURCES DEVOTED TO CUSTOMS OVERSIGHT
BY THE OFFICE OF THE ASSISTANT SECRETARY FOR MANAGEMENT

MAY 1990

	FTE	$
Office of the Deputy Assistant Secretary for Departmental Finance and Management:		
Financial Services Directorate	4.5	$ 289,000
Management Programs Directorate	1.9	120,000
Human Resources Directorate	16.0	900,000
	22.4	1,309,000
Office of the Deputy Assistant Secretary for Information Systems	3.5	230,000
Total	25.9	$1,539,000

Notes:

The Financial Services Directorate has the primary oversight responsibility for Customs financial management and internal control issues.

The figures for the Human Resources Directorate include 13 FTE and $725,000 for Customs matters handled by Regional Complaint Centers.

Mr. ANTHONY. Mr. Chairman, I have a lot of other questions, but I know we have other members—have other panels coming before this committee and other members of this committee might have other questions as well.

With your permission, Mr. Secretary, so I could have a clearer understanding of where you think our findings and our recommendations are valid and sensible, if you could be more specific; just take them one at a time and give us your position on them.

Obviously, the ones I am more interested in are those you disagree with rather than those that you agree with.

Because, if you disagree with one of our findings or disagree with one of our recommendations, then we need to determine whether or not our policy position is right or wrong, or if your policy position is right or wrong. I do not think we will ever get to that point until we more clearly identify those areas where we have either major agreement or slight disagreement.

So, if you could, over the next few days, go back and consider these recommendations one at a time—take them a phrase at a time, a sentence at a time, a finding at a time, a recommendation at a time—submit your responses for the record, it would help us.

Again, emphasize the areas which you do not believe to be valid or sensible, and then let us see if we cannot determine where our differences of opinion lie.

And, I thank you, Mr. Chairman, for you courtesy in recognizing me on the second round.

Chairman GIBBONS. Certainly, you did a fine job.

Mr. Frenzel.

Mr. FRENZEL. Thank you, Mr. Chairman, thank you Secretary Nunez.

Are you prepared to talk about the administration's position on the extension and revision of the merchandise processing fee or would you feel more comfortable about answering questions for the record on that at your convenience?

Mr. NUNEZ. I would be happy to provide answers as soon as possible for the record.

Mr. FRENZEL. Mr. Chairman, I would then introduce three questions into the record on this subject and ask that the Treasury answer them when it can and I yield the balance of my time.

Chairman GIBBONS. I would like to put some time limit on this so that we can—what is a reasonable time limit for you all to answer all these things? I realize you have not seen all the questions yet, but could we give you—say until the end of the month or something like that?

Mr. NUNEZ. Mr. Chairman, the questions that Mr. Crane just asked about we can get you the answers to those by the end of the day today.

Chairman GIBBONS. Oh, that is fine. How about Mr. Anthony's questions? They had some they were going to ask for you. I would like to put your responses on the record.

Mr. NUNEZ. Whatever you think is reasonable.

Chairman GIBBONS. Well, how about the end of this month would be a—is that reasonable time for you?

Mr. NUNEZ. That would be more than I would have asked for.

Mr. FRENZEL. I think he needs to do mine before the end of the month it relates to a bill in conference.

Chairman GIBBONS. Well, he says he is going to do yours today so we are not worried about him, but I did not know how much time it was going to take you to do a responsible job on Mr. Anthony's questions.

Mr. ANTHONY. Mr. Chairman, would you yield to me just a moment?

Chairman GIBBONS. Certainly.

Mr. ANTHONY. Mr. Secretary, I want you to be sure to do one thing for me. Customs has already testified and we are working with Customs all the time. What I want from you is Treasury's perspective, so if you could just put Customs' perspective on these findings and recommendations aside.

We have already gotten Customs' perspective, and I am not interested in a combination of the two—that is, Treasury and Customs collaborating on how these questions ought to be answered. This would not help us get to the proper oversight.

And, if this should happen, then I will merely write another letter to you and will ask more questions in future hearings.

So, just give us a good, straightforward brag about the things you are doing. Tell us when you think they are inaccurate, when you think the Department's performance and activities, with regard to these recommendations and the findings, are valid, and when you think we ought to implement them. Also indicate to us what you are going to do.

There is nothing sinister or complex about this request for information. I am trying to save the chairman the time it would take us to go through each one of these. After quickly calculating how long it would take to go through them all at this pace, I have a feeling that the chairman is going to grab the gavel any minute and hit the little pedestal over here, but rather hit me with it.

That is the reason for this request. So, as long as our request is clear, such information would improve this record and would provide us with an opportunity to implement those suggestions you feel to be sensible and valid—which is obviously what we want to do.

Thank you.

Mr. NUNEZ. I appreciate that, I understand.

Mr. ANTHONY. Thank you.

[Treasury submitted the following:]

FINDING 1: The relationship between the international trade community and the Customs Service has deteriorated substantially in recent years.

Recommendation: The Department of the Treasury should--

A. Ensure that anticipated changes in significant national Customs policies and procedures are presented to the Department of the Treasury Advisory Committee on Customs Commercial Operations before they are implemented. This procedure will enable the trade community to explain to the Department of the Treasury the impact that proposed changes might have on their internal operations and the time that might reasonably be expected to implement conforming internal procedural changes.

Response:

Treasury intends to encourage the consultative process between Treasury/Customs and the trade community. Treasury will make every good faith effort to ensure that the trade community is advised of new policies and procedures being considered by Customs and that their advice is obtained on those steps. We will depend heavily on the Treasury Advisory Committee on Customs Commercial Operations as the means for doing this.

In addition, Treasury will encourage Customs' efforts to provide technical advice and legal rulings to the trade community on a timely basis.

FINDING 2: The U.S. Customs Service allowed essential commercial services to deteriorate over the past decade, while its drug enforcement role has expanded.

Recommendation: The Department of the Treasury (and the Office of Management and Budget) should-

A. Adequately fund U.S. Customs Service commercial operations. Budgets for Customs commercial operations need to be based on the size of the processing backlogs and international trade volume increases.

Response: Treasury agrees that commercial operations should be adequately funded. The FY 1991 budget request includes an overall increase of $52.529 million, about a 9 percent increase over FY 1989. However, ultimate authority over funding of Customs operations lies with the Congress.

B. Oversee U.S. Customs Service spending to insure that appropriations for commercial activities are actually spent on those activities. Customs currently has great discretion over staffing allocation between commercial and non-commercial operations. The Department of the Treasury and the Office of Management and Budget should substantially limit that discretion by actively monitoring Customs budget execution and accounting information.

Response:

Customs currently has limited discretion over funding and staffing allocations between commercial and non-commercial operations. Beginning with FY 1988, commercial operations became a separate budget activity within the Customs Salaries and Expenses appropriation. Outside of certain limits, Customs is not able to reprogram funds between budget activities without the permission of both appropriations subcommittees.

FINDING 3: Most Customs Service management decisions are made without supporting data or analysis.

Recommendation: The Department of the Treasury should--

A. Determine and clearly designate which Department of the Treasury officials are responsible for oversight of the U.S. Customs Service. The Department of the Treasury has not performed its proper and necessary role for detailed revenue of ongoing Customs operations and has not required customs to develop the necessary program evaluation information to do so. This has been hampered by unclear or nonexistent delegation of duties at the Assistant Secretary level.

Response:

For many years the Assistant Secretary for Enforcement has had responsibility for oversight of the Treasury Department's enforcement bureaus, of which the Customs Service is one.

In carrying out this oversight responsibility, the Assistant Secretary for Enforcement is guided by the policies and advice of other offices in Treasury. With respect to legal matters, guidance is provided by the General Counsel. And with respect to financial management and other administrative matters, technical advice is provided by the Assistant Secretary for Management.

B. Exercise strong and effective control over U.S. Customs Service commercial operations. Customs mission is vital to this country. The Department of the Treasury is responsible for Customs performance of that mission. The Department of the Treasury's abrogation of its responsibility to oversee Customs must not continue.

Response: Treasury does not agree that its oversight responsibility has been abrogated. The Administration and Congress have charged the Customs Service with a wide variety of missions, other than commercial services, over the last decade. Treasury has made every effort to strike a balance and to oversee Customs' conduct in carrying out these missions.

FINDING 4: The U.S. Customs Service has violated federal spending laws.

Recommendation: The Department of the Treasury should--

A. Remove those Customs officials found to have knowingly violated Federal appropriation laws. This should include all of those officials involved in making obligations against-anticipated receivables in Fiscal Years 1987 and 1988, as well as all officials who backdated documents at the end of Fiscal Year 1988.

Response:

The incidents referred to are currently under investigation by the Treasury Department's Inspector General. The Assistant Secretary for Enforcement is awaiting a final report and the advice of the Department's General Counsel on that report.

Appropriate action will be taken if Customs officials are found to have violated the law.

B. Exercise more control over the expenditure of appropriated funds by the U.S. Customs Service. This should include actively supervising the Comptroller of Customs, as well as responding to reports of misconduct made to Department of the Treasury officials by Customs employees involved in expending appropriate funds.

Response:

The Departmental Office of Finance carefully reviews Customs' budget execution reports and regularly meets with Customs' personnel to discuss the status appropriations. Mid-year, third quarter, and end-of-year reviews are conducted and guidance is provided to Customs based on the findings resulting from these reviews. In addition, reprogramming of 10 percent or $500,000 (whichever is greater) must have Departmental and Congressional approval. Treasury does not believe it would be appropriate or helpful to become involved in Customs day-to-day operations or spending decisions.

With respect to handling of reports of misconduct, the Office of the Inspector General receives reports of misconduct from employees of the Department of the Treasury, including those made by Customs employees involved in expending appropriated funds. Any misconduct issues raised by employees are reviewed and analyzed, and investigations are initiated when appropriate. In addition, the Inspector General audits programs and operations within the Customs Service on a continuous basis.

C. Discipline all Department of the Treasury and U.S. Customs Service officials who commit prohibited personnel practices or retaliate in any way against employees who report violations of the law. This action should include disciplining those officials who committed prohibited personnel practices in the case of the whistleblower who testified before the Subcommittee on April 17, 1989.

Response:

Treasury agrees that persons who commit prohibited personnel practices, or who retaliate against employees who report violations of law, should be appropriately disciplined.

The Treasury Department is in litigation with the particular whistleblower to whom reference is made, and will not comment on that particular case.

D. Establish a formal policy for actively cultivating employees reporting of wrongdoing, and for protecting the rights of whistleblowers within the agency. This policy should be in full conformance with P.L. 101-12, the new Whistleblower Protection Act.

Response: Treasury agrees that whistleblowers should be not only protected, they should be encouraged. In order to create an environment in which Treasury employees are encouraged to report violations of law, the Office of the Inspector General has developed an integrity awareness program to make employees of the Department aware of their responsibilities to report wrongdoing, and aware of the procedures they may use. Sessions are conducted for employees at various locations nationwide. For example, employees are advised on the Inspector General 800 hotline number which they may use to telephone their complaints of allegations from anywhere in the United States. During these sessions the employees are also advised of the Inspector General policy of confidentiality, which allows the individual to remain anonymous unless he chooses otherwise. The policy helps to ensure that a whistleblower's identity will not be made public. Inspector General posters are also on display in all Treasury bureaus.

In July 1989, the Secretary sent a memorandum to all Treasury employees on "preserving public trust". In that memorandum, the Secretary urged all employees to make use of the Inspector General hotline. For those employees who may have reservations about calling the hotline, the Secretary advised that employees could also contact the Departmental Comptroller's office to report perceived wrongdoing. Calls to the Comptroller's office are also handled on a confidential basis.

FINDING 5: The U.S. Customs Service Automated Commercial System has serious flaws.

Recommendation: The Department of the Treasury should --

A. Increase its oversight of the development and operation of the U.S. Customs Service Automated Commercial System (ACS). This oversight must ensure that Customs complies in spirit and practice with generally accepted "life-cycle management" practices in developing and operating ACS. The Department of the Treasury must also ensure that ACS properly interfaces with other Treasury Department of Automated systems and that ACS adequately meets the user and management needs of the Department of the Treasury.

Response:

As is true with any major project of this sort, the development of the Automated Commercial System has not been without mistakes. However, recent discussions during Treasury Advisory Committee meetings with customs brokers and other who use the system indicate that these flaws are being corrected and that there is general agreement that the ACS is a very valuable tool. The March 2 Journal of Commerce carried an article, reported from the national customs brokers annual meeting, with the headline "Customs Brokers Say Automated System OK". A copy of that article is appended.

Treasury will support Customs' efforts to build on this success. Treasury staff will work with Customs and ACS users in the trade community to improve ACS and to extend its applications into new areas (improvement of export controls and export statistics, expanded use of pre-filed entries to accelerate cargo release, etc.).

The Deputy Assistant Secretary for Information Systems and staff of the Office of Enforcement meet monthly with senior Customs management to discuss the ongoing development of ACS.

FINDING 6:

Recommendation: The Department of the Treasury should --

A. Monitor U.S. Customs Service efforts to correct its long-standing accounting control problems. While it would appear from the documents being officially transmitted from Customs to the Department of the Treasury and to the Subcommittee that Customs has made great strides towards correcting its accounting control problems, the Department of the Treasury should ensure that effective corrections are actually being made.

Response:

Restoration of integrity to Customs accounting system is one of Treasury's highest priorities with respect to Customs. However, it is recognized that achievement of this objective will require a 2-3 year effort and that to insist on immediate results will be to invite band-aid cures that will do nothing to strengthen the system fundamentally.

As the Subcommittee report acknowledges, Treasury's financial management staff have been working with Customs staff for some time to identify problems and to plan for permanent solutions. Customs has already taken a number of corrective actions to improve its internal controls and accounting systems.

Treasury will ensure that the plan for restoring confidence in the accounting system is carried out, that there is an ambitious timetable for completing each phase of the plan, and that the professional managers who are responsible for implementing the plan are free from distractions and interference. The Assistant Secretary for Management and her staff will have a major role in overseeing this effort.

In addition, the Office of the Inspector General has in progress, or is planning to conduct in the near future, several audits focusing on financial accounting issues at the U.S. Customs Service. For example, an audit of Customs' revenue accounting and reconciliation is currently underway. This audit is evaluating major controls over Customs' offices, deposits and processing by depositories and the Federal Reserve System, and the accounting and reconciliation process at the Customs National Finance Center. Audits scheduled to begin in the third quarter of this fiscal year will examine both the effectiveness of the controls over Customs' budget execution, and the automated and procedural controls over the issuance of refunds on collections. Other financial related audits which the Inspector General plans to start this fiscal year include evaluations of controls over the approximately $260 million

of vendor payments processed annually at the National Finance Center, and the controls exercised over approximately $240 million of Customs' accounts receivable.

One of the standard procedures in all Inspector General audits is to determine whether there is effective implementation of scheduled corrective actions resulting from prior audits and FMFIA reviews. The Inspector General, through the conduct of audits, will assist the Department in monitoring Customs' efforts to correct in accounting control problems by reporting as part of these audits whether Customs' scheduled corrective actions are being implemented.

B. Ensure that the U.S. Customs Service is allocated adequate resources to correct its accounting control problems. The Department of the Treasury assured the Subcommittee that adequate resources had been requested in the President's fiscal year 1990 budget to support Customs efforts to correct its accounting control problem. In follow-up, the Department of the Treasury should reassess the adequacy of Customs budget to ensure a continued Customs effort to resolve its accounting problems.

Response:

The FY 1991 budget request includes a new initiative to continue the development of the Customs Automated Management Information System.

In preparing the FY 1992 budget request, Treasury will emphasize improvement of financial management systems and correction of known internal control weaknesses.

C. Review, with the assistance of the Inspector General, all Federal Manager's Financial Integrity Act corrective actions reported by the U.S. Customs Service to verify implementation. The results of the review should be reported to the Committee on Ways and Means. These reviews should be done annually until the Customs Federal Managers Financial Integrity Act (FMFIA) reports are in full compliance.

Response: Treasury is reviewing reported corrective actions to validate the reports. However, full verification of each reported corrective action is neither necessary nor feasible. Instead, Treasury is closely examining selected corrective actions for verification.

The Treasury Inspector General will be involved in making this assessment, through the many audits of Customs' operation which the Inspector General has planned or in process.

FINDING 7: The U.S. Customs Service cargo examination program is misdirected and inefficient.

Recommendation: None for Treasury

FINDING 8: The U.S. Customs Service Centralized Examination Station program is poorly managed and vulnerable to fraud.

Recommendation: None for Treasury

FINDING 9: The U.S. Customs Service abused its authority to seize commercial merchandise.

Recommendation: None for Treasury

FINDING 10: The U.S. Customs Service methods for processing airline passengers are inefficient.

Recommendation: None for Treasury

FINDING 11: The U.S. Customs Service has little or no incentive to avoid damaging cargo during examination.

Recommendation: None for Treasury

FINDING 12: The U.S. Customs Service seized property program loses money and is mismanaged.

Recommendation: The Department of the Treasury should--

A. Significantly increase its oversight of Customs seized property program management. The Department of the Treasury's review should focus on ensuring accurate financial reporting of program performance and the existence of an adequate system of internal controls to prevent fraud, waste, and abuse.

Response:

The Customs Service turned management of the seized property program over to a contractor several years ago, when Congressional reports expressed dissatisfaction with the manner in which Customs was managing the program with its own employees.

As the Oversight Subcommittee report notes, this first effort at having seized property handled by a contractor developed some significant problems, and Treasury and Customs are working to correct those problems.

The following facts may help to put the seized property problem into perspective:

In FY 1989, out of all the property seized:

-- 77.0% was remitted to the owner;
-- 5.6% had to be destroyed
-- 2.2% was shared with other law enforcement agencies
-- 2.7% was retained by Customs for law enforcement
-- 2.2% was donated to a charity, because it could not be sold in the U.S.
-- 10.3% was sold at auction.

Obviously, the sale of 10.3% of all property seized could not be expected to offset the lost opportunity cost from the assets that were disposed of otherwise. While this program was designed to operate in a business-like manner, it was not designed on a profit/loss basis.

Customs is currently reviewing bids on a new seized property contract. When that contract is awarded, Treasury intends to establish a program of systematic reviews to ensure that the seized property program is being run efficiently.

FINDING 13:

Recommendation: The Department of the Treasury should--

A. Negotiate a Memorandum of Understanding with the Department of Commerce outlining specific responsibilities and duties for enforcement of antidumping and countervailing duty (AD/CVD) laws, in consultation with the Committee on Ways and Means. The agreement should include the Department of Commerce's specific data requirements and Customs plans to meet those needs.

Response: Treasury staff will meet with Office of Import Administration staff at Commerce to arrange for improved coordination between Customs and Commerce. If a memorandum of understanding is desirable, Treasury will enter into discussions with Commerce to develop such a memorandum.

It should be noted that a new AD/CVD module was implemented in Customs' Automated Commercial System in January of 1990, and is expected to eliminate some of the major problems identified in the Subcommittee's report.

FINDING 14: The costs of the U.S. Customs Service Cargo examination program are distributed inequitably.

Recommendation: None for Treasury

FINDING 15: The U.S. Customs Service has neglected its rights under Customs surety bonds.

Recommendation: None for Treasury

FINDING 16: The U.S. Customs Service has failed to encourage the cooperation of the trade community in its commercial narcotics enforcement programs.

Recommendation: None for Treasury

Chairman GIBBONS. Well, thank you, Mr. Secretary. I have lots of Nunez' in my district, you kin to any of them?

Mr. NUNEZ. I do not think so.

Chairman GIBBONS. You do not think so, well, if you do a good job they will probably all claim kin to you so, Mr. Secretary, kind of outline for me what you see as your powers, your duties and responsibilities and let me first of all ask if there is anyone between you and the head of the Customs Department in this chain of command? Is there anyone else and how about between you and the Secretary of the Treasury?

Mr. NUNEZ. Well, no, there is no one between me and the Commissioner of Customs. She and I have frequent meetings, frequent phone conversations, we have done a number of things together already, she has been kind enough to invite me to participate in regular senior staff meetings that she has for her people and obviously that gives me the opportunity to get a kind of hands on or a real close look at what is going on.

I am very happy with the relationship I have with the Commissioner of Customs and look forward to working with her.

With regard to the upward chain of command I report directly to the Deputy Secretary and he also has participated in various meetings of one sort or another with the Commissioner of Customs and with me and this morning, as a matter of fact, we had an all bureau head meeting that is chaired each month by the Deputy. On those occasions when it is necessary to deal with the Secretary the Secretary is available.

Chairman GIBBONS. Well, give me the name of the person that is between you and the Secretary.

Mr. NUNEZ. The Deputy Secretary, John Robson.

Chairman GIBBONS. Well, I hope—you probably were not around when we had some other unpleasantries with the Treasury. A number of years ago this committee, in a hearing in this same room, almost the identical subject, had some long discussions with your Enforcement Department or your former Enforcement Department in dealing with some of the unfair trade practices laws. We had cases over there that were unresolved and we asked them respectfully to get them resolved and they had only them—some of them for 20 years.

They just were not doing their job and we called them in and cautioned them quietly to do that. It was not even a public hearing like this, it was an executive session.

We came—they promised they would, we came back 2 years later, they had not done a thing, still had a lot of excuses and so we gave them a little more time and found out they still were not doing anything and we just moved that whole department, whole agency right out of the Secretary of Treasury's Office.

Now, I do not want to have to move Customs, it has been there I guess for 200 years. It is as old as this country, perhaps older, but if these people are not doing their job exactly right it undermines the whole system more importantly than we can all imagine.

Undermines the trade laws, undermines the enforcement of all this, these countervailing antidumping things have got to be vigorously enforced.

We have a procedure that torture us if—finally makes a decision, once it has made a decision—if they are not enforced vigorously and thoroughly then it undermines the whole system and we are just not going to tolerate that kind of enforcement through our law enforcement agencies.

And, so I hope you will pay particular attention to that so that you—the next time we have a hearing like this—can come before this committee and say we have upheld the law 100 percent.

Now, if we have got any goofy laws out there that you cannot uphold, please let us know. We have probably passed some of those in the past and if you see us about to pass a law that is impossible to enforce, let us know, we would appreciate it.

And I hope that the next time we meet in this sort of format you can sit there and proudly say we have not got any of those problems left. We are solving them quickly and we are glad to report that.

So, thank you very much for coming today and for handling yourself with dignity and with skill.

Thank you, sir.

Mr. NUNEZ. Thank you, Mr. Chairman.

Chairman GIBBONS. The American Association of Exporters and Importers, Barry Nemmers.

[Pause.]

Chairman GIBBONS. Yes, sir, go right ahead, Mr. Nemmers.

STATEMENT OF BARRY NEMMERS, DIRECTOR AND CHAIRMAN, CUSTOMS OPERATIONS COMMITTEE, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

Mr. NEMMERS. Good morning, Mr. Chairman, committee members.

My name is Barry Nemmers and I am representing the AAEI in my capacity as a director and chairman of its customs operations committee.

In a statement I presented on behalf of AAEI before your committee in February 1989, I expressed regret that we had to come before you so frequently to make the same requests for assistance.

This year I am happy to say that real change seems to be under way. The adversarial relationship between Customs and the import community is gone. Customs is not only welcoming importer comments on new programs, it is actively soliciting them from us.

It appears that we are entering a period of communication and coordination. Many past issues do remain open, new ones are appearing, and the Customs Service still needs to rebuild both morale and staffing, but the poisonous atmosphere that we have lived in for the last 7 or 8 years of cynicism and disrespect appears to have lifted.

I qualify these sentences not just because I am an attorney, but because one thing we have learned from the past two commissioner appointments is just how dramatically one person, given the backing of an administration, can affect an agency, individual companies, and even U.S. trade.

And I might note that I do not believe Customs itself really understood or appreciated how difficult it was making the daily lives

of thousands of ordinary hard-working American employees in corporate traffic departments who really had to bear the ultimate brunt of the frequent arbitrary and purposeless requests and demands.

However, change has come. And while it is entirely possible that President Bush would have directed such a dramatic policy change and reversal on his own, we must believe that the change is in very large part due to the clear and firm positions taken by your subcommittee over the last few years and the indepth investigation and report of the Oversight Subcommittee.

Your efforts have borne fruit and we are grateful.

As you know, there is much substantive work now to be done. There are modernization reforms to allow for automation and there are remedial reforms to change the excesses of the past 8 years and to prevent their reoccurrence.

We reiterate our support for the legislation proposed by the joint industry group. We particularly urge action on several issues:

Immediate legislation to allow testing and then the implementation of national entry filing and processing. There is no longer any rational purpose for requiring entries to be filed physically in the port of entry.

The amendment of section 595a(c), I am sure you have heard plenty on this yesterday and in the past, but Customs should not be allowed to use seizures in lieu of doing homework or to use them where detentions can remedy problems.

The cost of centralized inspections or any other actions mandated by Customs should be absorbed by Customs.

The Customs Service should not continue to enjoy a blanket shield from liability for damage to merchandise inflicted by Customs unnecessarily.

We do believe it is premature to comment on Customs' concept paper for Customs Modernization Act and we do so for a specific reason: that is that next week Customs is meeting with us in New York at its request to explain the proposal in more detail.

We should, in all fairness, withhold comment at least until then. But most relevant is that at this time there is such a public paper and that they have requested such meetings.

Those are major differences.

We, of course, would be happy to answer questions about the synopsis.

We want to emphasis our support and commitment to the automated commercial system. We agree with the report that Customs must ensure that it has a solid hardware and software basis for the programs already introduced and for the volume of entries which will move through the system.

We do hope there will be no reduction in the rate of introduction of new modules, however.

ACS is a single integrated system. As long as any parts of the system remain paper intensive, the whole system cannot perform to its potential and is vulnerable to breakdown.

At present, virtually the entire life of an entry after liquidation depends on paper, paper which is only created at that point.

This is a very vulnerable transition from electronic to paper and one, frankly, in which Customs is very often at more risk than the

importer. The potential for real and perceived inequities remains great until the entire system and importers' commercial practices are completely shifted to an electronic mode and to electronic ways of thinking.

One other area of great concern to us and to which we will return in future statements is Customs past and continuing insistence on shortening the times for importers to respond to a Customs demand or mandate while Customs is taking longer and longer to complete its part of the transaction.

Thirty-day limits to respond to prepenalty notices do not reflect the commercial realities of moving paper through a corporation, or the realities of the U.S. Postal Service. Yet we are expected to recognize the realities of moving paper through bureaucracy.

The answers are not to set unreasonably short time limits on Customs, nor to eliminate its flexibility on time limits. There is middle ground for us in this area and we will come back to this in the context of the JIG and Customs bills.

Finally, we want to thank the Oversight Committee for its work and Tom Arnold, its investigator, who has become known to Customs and to importers as the "Ubiquitous Tom Arnold."

There were some days you would walk into a meeting a little sleepy and not remember for sure whom he worked for and I think maybe that might have been his purpose.

The work of the committee and of your committee is greatly appreciated.

We hope it is now possible to focus on the positive parts of Customs and to see how those actions can be reproduced throughout the Customs Service to make it more efficient and more effective.

For example, Los Angeles, a port that was in some considerable disarray a few years ago has substantially improved to the point where it is no longer a sore thumb or a port to be avoided at all costs. What has been done in Los Angeles to bring it that far that quickly? Are there things there that can be applied in other ports? And how is it that the liquidation and protest section in New York is accessible by telephone for assistance but in some other ports you cannot reach them. Is there something there that can be applied elsewhere in Customs? These efficiencies and such assistance ultimately save Customs time and should be encouraged.

The report has already had great effect and in some part, is history. We hope that the effect of the report and the new atmosphere is that the many very talented career officials in Customs will be encouraged to rebuild morale and efficiency and to meet the goal that Commissioner Hallett has set, that is, to make the U.S. Customs Service the world's model customs authority.

The report and the perseverance of the Trade Subcommittee could have no greater ultimate effect.

Thank you.

[The statement of Mr. Nemmers follows:]

STATEMENT OF THE AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

AAEI members thanks this Subcommittee and the Subcommittee on Oversight for their close attention to Customs commercial operations over the past few years. The Oversight Subcommittee and staff deserve special thanks for their hard work and time on this report.

Two years ago, AAEI testified on its member' relations, good and bad, with the U.S. Customs Service before the Oversight Subcommittee as part of its investigation. At that time, the instances of Customs' cooperating with the trade community all too often were overshadowed, if not overwhelmed, by the adversarial nature of the day-to-day relationship. It appeared to us that as a matter of policy, communication had been replaced by intimidation.

While the Pickle Report is on target in its recitation of Customs "horror" stories, the Report's completion and the appointment of a new Commissioner have bought about a radical change in the attitude and operations of the Customs Service. AAEI members and Customs are working more closely than ever to ensure compliance and facilitate commercial processing. Recently an Executive Exchange Program was begun whereby officials of Customs visit AAEI members facilities and AAEI members visit Customs' district and regional operations. So far the program has been held sucessfully in the New York Region and the Los Angeles District, with a visit scheduled on May 16th to the Boston District. Customs' headquarters personnel have visited North American Philips Corp.'s operations in New York City and Connecticut and toured Xerox's operations in Webster, New York. Customs personnel also are participating in more AAEI seminars and briefings to educate members and is allowing AAEI members to attend commodity-specific seminars run by the National Import Specialists. These exchanges of information benefit both U.S. business and Customs. We believe we are not premature in saying that much of the ancedotal evidence in the Report as to which we have any knowledge, happily, is history. However, such evidence is very important in that it demonstrates how one personality can affect not only a government agency, but also all U.S. trade.

AAEI believes that the report and these hearings substantiate the need for legislation to reform and modernize Customs. The recent changes are welcome and encouraging, but AAEI members and the rest of the trade community need certainty that reform legislation will bring to international trade. Customs' relationship with importers and exporters must never again be allowed to slide or, as in the past eight years be pushed again into an adversarial relationship.

AAEI is part of the coalition--the Joint Industry Group (JIG)--that is sponsoring the Customs Reform Act of 1990, and fully supports the legislation. On a few issues, however, AAEI members urge this Committee to move even further than requested in the JIG legislative proposal.

The "economic problems" of the Customs Service are of great concern to the U.S. business community. Alleged violations of Federal spending laws, neglect of accounting controls and financial mismanagement of Customs programs are serious accusations. Should these allegations prove to be true the individuals thought to be responsible for these problems should be held accountable. However, AAEI wants to emphasize that these "failures" should not be held against all Customs personnel. It is the Association's experience that Customs employees, from the field to Headquarters, are dedicated, honest, hard-working individuals. Any legislative remedies to correct such matters should be narrowly drafted and implemented with the consultation of the trade community and Customs.

Automation

The most potentially beneficial Customs program of the 1980's was the Automated Commercial System (ACS). Although instituted with the sledgehammer "Automate or Perish" approach, the goal of paperless entry and electronic communication between Customs and the importer rightfully remains the priority project for Customs and the trade community in the 1990's. Customs has knowledgeable, if too few, staff to implement and oversee the ACS. The Pickle Report highlights problems in the past with ACS programs, especially the lack of input solicited from importers and the great cost to them and brokers. Recently, AAEI members have been given the opportunity by Customs to provide more input before commitments are made to new automation programs. AAEI agrees with the Oversight Subcommittee and Customs that statutory changes are needed to allow the Service to fully automate. Association members believe, however, that both the Customs and JIG proposals inadequately address one important piece of the automation equation--remote filing or national entry processing (NEP).

Both 19 USC 1584 and 1641 should be amended to allow for NEP and for an accompanying "national" waiver of the district broker permit requirement, AAEI realizes the concerns that NEP raises and accordingly supports a complete and fair test of the program before it is made official. However, since Customs has repeatedly stated that it will be at least 18 months (and probably longer, in light of the Pickle Report) from date of passage of the enabling legislation before the program could become fully operational, the statute needs to be amended now. The time between enactment and the first official NEP entry will allow for careful evaluation of the program including adequate enforcement safeguards.

Mr. Chairman, many AAEI members now are able and ready to file entries electronically from one central location. Only an outmoded statute and an understaffed Customs Service prevents them from acquiring the substantial commercial benefits of such centralization. Those members transmit information electronically within their company and in commercial transactions, yet for Customs' purposes they must produce paper. If the ACS is to develop to its real capabilities and Customs is to move into the 20th and 21st centuries, the tools must be provided sooner rather than later.

Seizures Under 1595a(c)

AAEI certainly agrees, and this Committee is no stranger to the fact, that Customs abused its authority under 19USC1595a(c). Customs has since adopted a more sensible and fair approach to handling cases under the statute. AAEI members acknowledge the interpretation and operational changes but continue to urge the repeal of subsection (c). If Customs truly needs this authority for certain commercial merchandise that is prohibited by law, a substitute section with precise language and a clearly stated grant of authority be drafted. In either case, the language should only apply to the portion of the merchandise alleged to be in violation, not the entire shipment. AAEI members have been victims of, and could continue to be, Customs intimidation under this statute.

Centralized Examination Stations

AAEI agrees with the steps outlined in the Pickle Report to increase Customs' management of CES operations and operators. However, Finding Number 8E of that report should be expanded beyond mere control of costs, to have Customs pay the full importers' cost of centralized examination. Importers have no control over the CES or over which goods Customs targets for inspection at the CES. Before CES's, Customs assumed the cost of inspection and still generated substantial revenue for the U.S. Treasury. Now, the never-expiring user fee gives an even greater reason for Customs to pay for CES costs.

There are those who would argue that in applying user fees to cover CES costs of that importers' goods which are not inspected would subside the others. However, the same argument applies to goods whose processing costs are exempt from the user fee and paid out of the general treasury. AAEI asks Congress and Customs to be consistent.

Liability For Damaged Merchandise

AAEI members emphatically urge this Committee to adopt the Pickle Report's Finding Number 11. While the incidence of damage to Customs' detained merchandise is lower than before, a deterrent is needed to protect honest importers as drug enforcement increases. Customs must be held liable for damage inflicted on the goods by Customs.

Drawback

AAEI praises Customs for its internal study of its drawback procedures. The study is very self-critical and is an important first step in "revitalizing" drawback as tool to maintain the competitiveness of U.S. manufacturers and exporters. The Association is concerned, however, that two major changes to the drawback program proposed in Customs' Modernization legislation will become law over the objections of U.S. business. Customs plans to shorten the time limits to export and file drawback claims, and also impose further penalties based on Section 592 of the Trade Act of 1974. Customs has provided little justification for these proposals. The importance of drawback to U.S. manufacturers and exporters requires that full, separate hearings are held to evaluate these Customs' controversial proposals.

Conclusion

These are the major concerns of U.S. businesses that import, based upon the Customs synopsis of its legislation. AAEI wishes to provide more detailed comments on Customs proposed "modernization" legislation to this Committee after May 10th, when Customs will provide the specifics of the legislation, including the legislative language to AAEI in New York. For example, Customs' synopsis of its legislation proposes to amend current law to allow Customs to extend the statute of limitations for penalty cases simply by filing a pre-penalty notice. Without specific language AAEI is uncertain of the intent or the necessity for the proposal.

AAEI again thanks this Committee and the Oversight Subcommittee for the interest and resources you have devoted to addressing the problems and procedures of Customs Commercial Operations. Your attention has produced significant and beneficial effects. In combination with open and balanced approach demostrated by Commissioner Hallett, the trade community can once again count on a Customs processing that facilitates rather than delays shipments and Customs enforcement that is even-handed and fair. AAEI urges this Committee to approve provisions of the the JIG-sponsored Customs Reform Legislation, with the amendments suggested above. This legislation combined with adequate resources and continues oversight of Customs will ensure that U.S. business will not be unduly hampered in its efforts to increase international trade.

AAEI also urges this Committee to hold hearings on the Customs legislation once the bill is formally introduced. AAEI and its members look forward to working with this Committee and Customs to achieve true Customs modernization.

Chairman GIBBONS. Thank you, sir, that is some very constructive testimony and very rewarding to hear. Have you all tackled the problem of privacy in this new automated system of entry that we are talking about?

Mr. NEMMERS. It is one of the issues that we are looking at. It is a little early to tell where there might be vulnerabilities within the system.

There are a number of large corporations who have a history of using electronic processing of paperwork and they are relatively confident that privacy will not be a serious issue, at least no more so than it is now with paper.

If you walk into a Customs office, the mounds and mounds of paper just sitting on tables do not provide you a great deal of privacy either.

And, of course, any electronic system is vulnerable to dedicated hackers. At the moment we do not see obvious problems but it is something we are very concerned about and will watch.

Chairman GIBBONS. Mr. Frenzel.

Mr. FRENZEL. I have no questions, Mr. Chairman.

Chairman GIBBONS. Mr. Schulze.

Mr. SCHULZE. Thank you, Mr. Chairman, thank you for your testimony. It is an interesting perspective and one that is valuable to us and I guess my question is are you convinced that the new regimes in Treasury and at Customs are committed to reform for the better and you see this happening on a daily basis?

Mr. NEMMERS. It is early, but we have seen nothing to indicate that they are not. We are seeing the word reach the ports and we are seeing first instances of the ports changing their attitude toward importers and being more open and that is a very positive sign to us.

Mr. SCHULZE. Your testimony is positive and we are glad that it is. We hope that this is the culmination of this 2-year investigation into what is going on.

Another of my concerns are the new computers and new computer programs and so forth and I hope somebody with some common sense is keeping an eye on those and saying will they be practical, will they be realistic, and will they be of value to us in the next 10 years and if you get any input on that along the way we would like very much to have it.

Mr. NEMMERS. Thank you, we will do that.

Mr. SCHULZE. Thank you, Mr. Chairman.

Chairman GIBBONS. Well, before you leave let me again say how much I appreciate the fine work that the Oversight Subcommittee has done in doing this and I think it is working in the spirit of oversight, the spirit of cooperation that it was set up to do.

Mr. Frenzel, did you have a question?

Mr. FRENZEL. Yes, I do. I want to thank the witness and suggest that if the witness would like to talk about the question I raised with Treasury that maybe it is not on the oversight business but it relates to the merchandise processing fee and the Congress will shortly be making some kind of decision on that and do you have guidance you want to give us on that subject?

Mr. NEMMERS. The AAEI has maintained a fairly simple position throughout and that is that the fee should be repealed. That is not

just because of its cost. Increasingly we are convinced that there is no way to come up with a fair nondiscriminatory fee.

A fee is going to hurt some groups of people no matter how it is structured, whether it is a transaction based fee, an ad valorem or modified ad valorem. And however you make your basic approach you then have to deal with the details. Do you put the fee on informal entries, do you put the fees on various other smaller segments of the entry community.

I personally have a great deal of difficulty understanding the logic and fairness of a fee that is accessed on an ad valorem or a modified ad valorem basis. I simply do not understand why an entry, simply because it is high value, should pay more.

The rationale for the fee is to cover customs costs. Certainly among my clients, high value fees generally represent simple entries that are processed without need for an import specialist to even look at them.

They are repetitive, they are not politically sensitive merchandise and a multimillion dollar entry will go through without any work at all.

On the other hand, I understand that it is hardly fair to access all of the fee on smaller companies who can only import in small values but who have products that require a lot of processing.

So, I think you have an inherently unfair system that should be repealed as soon as possible. I recognize the problem.

Mr. FRENZEL. It is a wonderful thing and this subcommittee, of course, resisted the imposition of that fee but we are stuck with it, the chaplain has gone ashore and now you have got to tell us in what formula you would like to have the poison administered.

Mr. NEMMERS. I think at this point it is almost arbitrary which formula you choose as long as it is as painless as possible.

Mr. FRENZEL. OK, thanks very much.

Chairman GIBBONS. Thank you.

National Treasury, Mr. Tobias. You have got a thick sheet of documents there.

STATEMENT OF ROBERT M. TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Good morning.

Chairman GIBBONS. Good morning. You are going to have to get a little closer to that microphone, Mr. Tobias.

Mr. TOBIAS. Well, I very much appreciate, Mr. Chairman, the opportunity to testify this morning, and you and this committee know more than most Members of Congress how the Customs environment has changed over the years.

In the last 10 years, for example, the number of containers that come into the United States have increased by 1 million, the air cargo tonnage has increased by a million, the number of aircraft arrivals have increased by 100,000 and the number of air passengers has increased by 15 million.

The number of informal entries have increased from 2.2 to 5 million and found entries increased from 4.5 to 10.5.

All of this occurred over the last 10 years with the same size staff. Procedures have changed and automation has been intro-

duced but the number of employees have remained precisely the same.

We believe, Mr. Chairman, that the procedural changes and the automation currently used is seriously flawed. The Customs mission has been seriously compromised and I think that is reflected in the findings of your report.

For example, finding No. 2 states clearly that commercial services have declined and I do not know that there is anyone who has testified before your committee who disputes that fact.

We concur in the recommendation of establishing a floor for commercial operations funding. Congressional intent should not be ignored and this can be accomplished only with a legislated floor.

We also agree that a workload analysis should be conducted but it should be done well, not with a survey of Customs employees.

Customs has responded to the trade communitys demand for increased services by establishing new shifts. This solution is more costly to the taxpayers and does not increase service.

Creating more shifts cuts down on the overtime, but it increases the salaries and expenses from the general appropriation. Overtime, of course, is funded from user fees but when a new shift is created general revenues are used.

Since there are no additional people being hired, Customs is merely moving employees from an already short staffed shift to a new shorter staffed shift, services are not enhanced.

The solution is more people and more flexibility to pay the overtime funded by those who want and need the additional service.

Finding No. 3, which states that most U.S. Customs Service management decisions are made without supporting data or analysis is precisely the reason that the U.S. Customs Service automated commercial system has serious flaws.

Over the years Customs failed to identify the goals, gather sufficient information about its needs, analyze the data collected, purchase the required equipment or properly and adequately train employees.

Notwithstanding any of this, Customs has forged ahead and spent millions and millions of dollars and has not, in our opinion, advanced the Customs mission. For example, Customs has designed a system which it describes as paperless and there has been much discussed about what goes in and what goes out of this paperless system.

But for our part, Mr. Chairman, we believe that this system leaves serious deficiencies in the way the Customs mission is accomplished. Too much is bypassed, not enough information is in the system to allow the Customs enforcement to take place. There is no interaction between the customs inspector and the computer, and the customs inspector is far away from where the goods are shipped.

Most of the examinations are done by asking someone to go out and fetch this, that, or the other thing and bring it to a Customs inspector for viewing as opposed to being out where the cargo is.

We believe that an interactive system where the databases can be used and where the Customs inspector can use his or her professionalism is the kind of system that we ought to have.

And we note, Mr. Chairman, that the importing community is very pleased with the fact that the Customs Commissioner has opened up a dialogue, but we are very concerned about the fact that the Customs Commissioner has not opened up the dialogue with the U.S. Customs Service employees.

We believe that we have a great deal to offer in improving the ACS system and we have, on many many occasions, sought to provide that information and been rebuffed at every turn.

We think that the Customs Service, and ultimately the tax paying public, is being cut out of a resource that would otherwise be available.

We also agree, Mr. Chairman, with finding No. 7 that the U.S. Customs Service Cargo Examination Program is misdirected and inefficient.

The introduction of computers into the work place does not free inspectors and import specialist to conduct more hands-on examinations and audits. In fact, at most sites far fewer inspections are performed under ACS and examinations are no more intensive.

This occurs because employees are required to spend too much time at the computer terminals to obtain instructions from ACS. And we believe this undermines the entire ACS system because the date upon which the selectivity is based must be continually updated if it is to be valid.

And the only reliable means of updating the data base is to conduct an adequate number of intensive exams and audits. There is no way around it. Customs must verify by actually looking at the merchandise and at a rate significantly greater than it does currently.

We suggest, Mr. Chairman, that a legislatively mandated minimum percentage of inspections, for example, 10 percent of all shipments, be established so that the Customs Service would know for sure that its selectivity factors are indeed accurate.

NTEU agrees with the subcommittee report that many fruitless exams are conducted because of ACS limitations. Unnecessary exams are conducted because of the cumbersome procedures needed to override ACS when the system calls for an intensive exam.

The inspector can only override such a designation if he/she has inspector knowledge, which is often difficult to articulate, so fruitless exams continue to be a problem.

On the other hand, because of lack of time taken up in part by fruitless exams, supervisors at JFK and possibly other locations overrule inspectors' orders to examine shipments, so necessary exams are not being done.

Chairman GIBBONS. Mr. Tobias, we are going to have to interrupt you and go over and vote and we will be right back.

If you will excuse us please.

Mr. TOBIAS. Thank you.

[Recess.]

Chairman GIBBONS. Well, Mr. Tobias, you may go ahead. We are back now.

Mr. TOBIAS. Thank you, Mr. Chairman.

As I was saying, I was talking about the Cargo Examination Program being misdirected and inefficient. We concur with a subcom-

mittee statement that others—agencies which rely on Customs to enforce their laws are not being properly served.

Inspectors are signing the licenses required by other Federal agencies without examining the merchandise. In many cases they are authorizing the restricted movement of freight without determining that the proper individual is actually taking possession.

One of the more disturbing aspects of the Cargo Examination Program is that in many locations inspectors are only provided information on shipments that have been recommended for examination by the ACS.

Where automated broker interface and automated manifest system come together, a broker will input an entry into his ABI computer and if the entry is ordered as a general exam by ACS the broker will be notified that he has 10 days to pay liquidated duties.

ACS then will notify AMS that the cargo is cleared by the Customs and may be delivered. All of this will happen with no opportunity for a customs officer to override for examination or document review.

Mr. Chairman, we also agree with finding No. 8 that the U.S. Customs Service centralized examination program is poorly managed and vulnerable to fraud.

The centralized examination program has not been properly evaluated by Customs since its inception. In addition to the subcommittees concerns, there are a number of inequitable procedures for the selection of CES's and lack of controls to prevent overbilling of importers but NTEU believes it also opens the door to wholesale circumvention of the trade laws.

In too many instances Customs fails to obtain control of the merchandise being produced for examination at the CES. For example, a container may arrive and be sent to a container freight station, an entry is filed, and an inspector requests to examine a portion of the shipment.

The broker sends a runner to pick up the merchandise and deliver it to CES for examination. The inspector has lost control of the significant aspect of the examination, that is, being able to view the entire container and select at that time which portion he/she will examine.

Even if the inspector designates which portion of the shipment is desired, the inspector has no way of ensuring it was that portion which was delivered to the CES.

Finding No. 10 is that the U.S. Customs Service methods for processing airline passengers are inefficient. We agree with that. We also agree that preclearance facilities facilitate the operation of U.S. airports and that to make the program effective we need more staff.

But we would like to bring to your attention, Mr. Chairman, a change in customs policy with regard to air passenger processing which has ironically resulted in a significant decrease in service to air passengers in some locations and it was done in response to a legislative mandate designed to improve service.

In an effort to expedite the flow of air passengers, Congress established a 45 minute goal for passenger processing. Unfortunately, in some locations, such as Dulles Airport, staff was actually reduced in response to the 45 minute goal.

Prior to the 45-minute requirement Dulles personnel were clearing passengers in as little as 15-minutes. With the advent of the 45 minute rule, Customs eliminated previous ratios of passengers to inspectors and substituted the "supervisors judgment" for determining staffing levels.

The result was a cut in service.

Obviously, a cut in service in response to the 45-minute rule turns the provisions on its head and should be addressed by this subcommittee.

Finding No. 11 concerns countervailing duty and antidumping orders. It is, after all, the most basic of our trade protections and in recent years U.S. industry has increasingly turned to these laws for relief from unfair trade practices.

Both laws provide relief in the form of additional duties on unfairly priced goods, but what we found is an inability to enforce those laws. The principle methods of its circumvention are misclassification, improper description, and transshipment through third countries to conceal country of origin.

As stated by the subcommittee, Customs has neither an adequate system for monitoring the entries to determine if Commerce's orders are being properly enforced or an enforcement program to guard against circumvention.

The root of this problem is the growing number of entries relative to the number of import specialists. The action begins with import specialists and there must be enough of them to make the necessary enforcement checks.

A post-audit approach will not work because the damage to the industry will be done if the goods enter the workplace.

Mr. Chairman, we applaud, whole heartedly, the effort that was put into the subcommittee's report and we stand ready to do whatever we can to assist you in ensuring that the recommendations which were made actually occur in the U.S. Customs Service.

Thank you.

[The statement of Mr. Tobias follows:]

TESTIMONY OF ROBERT M. TOBIAS
NATIONAL TREASURY EMPLOYEES UNION

Thank you Chairman Gibbons for the opportunity to present the views of the National Treasury Employees Union (NTEU) on reported abuses and mismanagement in the Customs Service's commercial operations. I am Robert M. Tobias, President of NTEU, which represents approximately 144,000 federal employees nationwide, including virtually all employees in the U.S. Customs Service.

Mr. Chairman, almost two years ago, NTEU, affected members of the trade community and interested parties in Congress and the Administration were asked to participate in a comprehensive review of Customs commercial operations programs. This oversight culminated in the February 8, 1990 release of the Subcommittee on Oversight's report. NTEU is very pleased to have the opportunity to comment on the findings in the report and to bring to the Trade subcommittee's attention additional abuses, which must be addressed if the Customs Service is ever to meet its enforcement responsibilities, while accomplishing its commercial mission.

NTEU's Comments and Recommendations

Finding Number 2: The U.S. Customs Service allowed essential commercial services to deteriorate over the past decade, while its drug enforcement role has expanded.

The subcommittee recommended the creation of a funding floor for commercial operations, and the enactment of long-term budget authorization legislation. NTEU agrees that a funding floor may be useful, but only if the total funding level is sufficient to provide the Service adequate resources to perform the full scope of its responsibilities.

As we stated in this year's authorization hearings, NTEU supports the enactment of a long-term budget authorization, but only if the legislation is carefully crafted so as to ensure congressional intent is honored. A multi-year, or even two year, authorization requires a capability to forecast resource needs, and the political will to ensure OMB does not disregard congressional priorities. NTEU agrees the continuation of annual budget hearings would provide the forum necessary for oversight.

The subcommittee also stated in its report that Customs should conduct an evaluation of its workforce and workload, which will be used to reevaluate staffing and budgetary requirements. NTEU believes any such evaluation should be conducted by highly trained professionals. While on the its face it would appear that employees performing a given function would be in the best position to record the full scope of their duties, they often times are not adequately trained to complete such a task.

Recently, Customs distributed questionnaires to its senior inspectors (titled "Job Analysis Inventory Form Number 0003" for Senior Inspectors GS11-1890). These questionnaires required the employees to identify the tasks they perform, how much time they spend on each task and the relative importance of each task. After completion , the forms are to be sent to OPM. Although Customs has stated this information is being collected to allow the Service to adjust its training programs, the information is also applicable to conducting a reevaluation of staffing and budgetary requirements.

As stated above, NTEU believes any such evaluation should be conducted by professionals. We have in the past experienced problems when the employees have been asked to conduct analyses of their own jobs. For example, NTEU recently participated in hearings concerning the problems associated with the contracting-out program, pursuant to OMB Circular A-76. One of the shortfalls of that program is that it requires the federal employees who are performing a function being considered for contracting-out to complete the government's "most-efficient-organization" study (MEO). The MEO is valid only if the affected employees are able to accurately complete a comprehensive summation of their duties,

but they are often unable to do so.

The subcommittee also recommended that Customs adjust its hours of operation and staffing levels to meet trade patterns. The best means of adjusting to meet trade community needs is raising the 1911 inspectional overtime cap, which provides Customs with the necessary additional flexibility in scheduling, unavailable by any other means, given the present staffing levels. Specifically, NTEU agrees with Commissioner Hallett that the 1911 inspectional overtime cap should be raised from its present level of $25,000 to $35,000 to help the Service meet the increased demand.

The establishment of additional shifts, without a significant increase in the staffing level, will not solve the problem. In fact, more shifts without additional personnel can often cause enforcement problems and additional expenditure of appropriated funds. When additional shifts are established a percentage of the experienced enforcement personnel are no longer available to work between the hours of 8:00 a.m. and 5:00 p.m., when the majority of commercial enforcement actions occur. Also, when shifts are implemented to the exclusion of inspectional overtime, there will be an absence of continuity in enforcement efforts. For example, at JFK and Los Angeles airports, Customs has established an additional shift for the Trade Enforcement Teams, without providing additional personnel for those teams. This has resulted in the break-up the Trade Inspector/Import Specialist work groups which must coordinate their activities to be effective. The trade inspector relies on the import specialist's in-depth knowledge of commodities, while the trade inspector brings his enforcement skills to the team. Both groups must work as a unit to be effective.

An example of a change in shifts which has proved to be very costly occurred last year at Dulles airport. While the number of inspectors has remained constant at 24 full-time equivalents (FTE's), Dulles management, in response to a concern that inspectors would exceed their overtime cap, doubled the number of shifts from two to four. This resulted in the expenditure of a great deal more night differential pay (base salary, plus 10%) and the hiring of WAE's to supplement the skeleton crews on each shift, all of which is funded by appropriated money.

Finding Number 3: Most U.S. Customs Service management decisions are made without supporting data or analysis.

The subcommittee found that Customs often initiated new programs without collecting information to determine whether the programs would accomplish their goals. It was recommended that Customs develop management information systems to collect relevant, quantifiable data for its programs.

NTEU fully supports this recommendation, and suggests that Congress provide for the establishment of an NTEU-Customs Service task force composed of affected NTEU bargaining unit employees and Customs management. NTEU believes that if Customs provides its many dedicated, knowledgeable employees an opportunity to participate, the Service will enhance its ability to cope with the challenges it faces in the future.

Finding Number 5: The U.S. Customs Service Automated Commercial System has serious flaws.

The automated commercial system (ACS), as we pointed out almost two years ago before the Oversight subcommittee, does have many serious flaws. These flaws are often a product of Customs headstrong desire to forge ahead with a module before it has been thoroughly tested, and without adequate feedback from the trade community, Customs employees and other affected persons. Again, NTEU urges the establishment of an NTEU-Customs task force,

similar to that in place for the trade community, which will provide affected employees a proper forum to provide input into changes needed in the ACS.

Concerning the specific recommendations in the report, NTEU believes that full compliance can best be established only if a paper trail is available, even if the ACS purports to go "paperless." We believe that with the technology currently in use within the ACS, it is important that backup paper documentation be available for Customs review, to permit regulatory work to be performed and for purposes of better analysis of future shipments.

A "paperless" system without access to relevant paper documents is inadequate for enforcement purposes for two reasons. First, not enough information is provided in the ACS to conduct an in-depth review. The ACS only requires entry of the importer's, consignees's and manufacturer's identification number, the harmonized tariff schedule (HTS) classification and country of origin. A paper analysis may necessitate a check of airway bills, packing lists, the full, complete invoice and forwarding lists, all of which could furnish additional clues confirming or bringing into question a shipment's stated country of origin, contents or weight, for example.

The second problem attendant to a "paperless" system is it negates the use of the experienced inspector's "sixth sense." In an effort to determine the authenticity of an invoice, an inspector can tell a good deal from the type of paper and print used on the document. Obviously, this is lost when the raw data merely appears on a computer screen. Furthermore, such documents such as visas, which require a stamp and signature, do not lend themselves to electronic conveyance, so there should always be some exceptions to a "paperless" system.

In short, NTEU does not believe the ACS has attained the level of sophistication demanded by the Oversight Subcommittee and necessary "...to ensure full compliance with all trade, narcotic, and other laws within its jurisdiction without the use of tangible forms of information and certifications."

In fact, even with access to backup paper documentation, the ACS has proven to be less than satisfactory as a means of assuring compliance. To access all the modules of the ACS, inspectors and import specialists need a considerable amount of training, as the system is not "user friendly." To date, many employees still have not received training, and many of those who have been trained can merely function as data transcribers, who can sign on and off but are unable to research the history of a given importer or manufacturer, for instance.

In addition, the network of computers fail to facilitate communication among divisions within the Service. As a result, the Inspector-Import Specialist team concept of enforcement is hindered. While an import specialist may be alerted to the fact that an inspector believes a shipment should be reviewed, the procedure at many sites does not give the import specialist the underlying rationale for the review, thereby making the import specialist function less effective and efficient.

The network does not manage the data bases available to Customs properly. As a result, employees are unable to interact with the machines (input and receive data) in the manner in which they must in order to make intelligent decisions concerning inspection and release of merchandise. For example, ACS does not require the volume or value of merchandise to be input into the system prior to selectivity determinations. Therefore a $1 shipment receives the same considerations as a $1,000,000 shipment, and a one pound shipment is considered no differently than a one thousand pound shipment. In addition, the automated programs do not interface with TECS or Fines, Penalties and Forfeiture

programs.

Oftentimes, there are simply not enough machines available. The lack of Customs terminals at each facility requires that each problem be referred to the main station, causing additional freight delays. The bulk of machines are assigned to data transcribers (non-government, contract employees) to input entries, and are therefore unavailable for inspectors or import specialists to use for research functions (e.g. conducting background searches on brokers and importers). At many locations the computer terminals are in a separate facility miles from the examination site, so the examining inspector has no opportunity to go beyond whatever initial intelligence or examination results were given to him.

The manufacturers' identification number (MID) is one of the bases for examination. The ACS has millions of invalid MID's. Recently the Service has attempted to correct this problem, but all the information filed with these invalid MID's for the past several years is worthless. The MID is one of the five identifiers under ACS which will trigger an enforcement action. Obviously, incorrect MID's will result in inspections not being done when they should, so enforcement suffers.

Usually, under ACS, informal entries (generally entries valued at $1,250 and below) are simply waived through without an inspection. This procedure creates an obvious opportunity for enforcement abuse. Although $1,250 is a small dollar amount, it can encompass a large volume of freight particularly from source narcotic countries such as Jamaica, Colombia, Mexico, and Thailand. For example, 8000 lbs of baby bananas from Ecuador are entered with an import value of $600. Truckloads of produce on the SW border may qualify for informal entry. Under ACS, none of these shipments is likely to be examined.

In addition, formal entry is not required for American goods returned up to $10,000 in value, non-commercial shipments, transportation in-bond, temporary importations, carnets and registrations. All these shipments by-pass the ACS computer. Because inspectors have been conditioned by Customs management, and through Customs policy, to release merchandise unless ACS requires an intensive exam, the vast majority of informal entries, a potential source for narcotics and other abuses, go unexamined.

Finally, because Customs has privatized the input of data into the ACS, it has created a potential for security violations and privacy abuse. The data transcribers not only have access to information about the importer, they are able to see narcotics and other alerts that the computer has in its database. They have the ability to make hard copies of this information which could be invaluable to a narcotics smuggler or even to an importer interested in information about his competitors' import activity.

NTEU believes the intelligent integration of computers into the Customs' workplace is necessary for the Service to perform its mission in the late 20th century and beyond. However, many aspects of ACS, and how it is being implemented, need to be changed if Customs is serious about meeting its mission responsibilities in both the enforcement and commercial areas.

Customs must devise a system which provides sufficient opportunities for employees to interact with the various ACS modules, so that the employees may more intelligently and more quickly perform their work. The computer can be an excellent tool, and can serve as a collective memory bank, or facilitate communication among employees, but it should not instruct an inspector to inspect or release merchandise. Such a directive is based almost entirely on historical data, ignoring the peculiarities of shipments which may cause an experienced inspector to conduct an intensive exam. That inspector should not have to move heaven and earth (i.e. override the computer's call from a

general exam) to exercise his/her good judgment.

Finding Number 7: The U.S. Customs Service cargo examination program is misdirected and inefficient.

NTEU agrees with the subcommittee that it is imperative that Customs "establish procedures to capitalize on the vast knowledge and the instincts of the thousands of experienced Customs inspectors..." and import specialists. This can best be done through good faith participation in an NTEU-Customs task force, as mentioned above, and in the establishment of a legislatively mandated minimum percentage of inspections (e.g. 10% of all shipments). Only in this manner can Congress be assured that Customs will seek and consider recommendations from its workforce, and collect empirical data through intensive exams, which are necessary to protect the integrity of the cargo examination program.

NTEU agrees that the cargo examination program is misdirected and inefficient, as it places too much reliance on analysis by Operations Analyst Specialists (OAS), and not enough emphasis on empirical data obtained from intensive exams.

The introduction of computers into the workplace has not freed inspectors and import specialists to conduct more hands-on examinations and audits. In fact, at most sites far fewer inspections are performed under ACS, and examinations are no more intensive. This occurs because employees are required to spend too much time at the computer terminals to obtain "instructions" from ACS.

This undermines the entire ACS because the data upon which the selectivity is based must be continually updated if it is to be valid, and the only reliable means of updating the data base is to conduct an adequate number of intensive exams and audits. There is no way around it - Customs must verify by actually looking at the merchandise, and at a rate significantly greater than it does currently. This may indeed require some additional personnel in commercial operations, but part of the time needed would become available if the ACS was functioning more effectively and employees using it were properly trained.

Proper training of all personnel, and modifications of existing ACS modules after input from those employees using the systems will help ACS work more effectively. Customs management is guilty of gross nonfeasance for its failure to provide adequate training for all affected personnel, even to this very day. Proper training should be the first order of business.

NTEU agrees with the subcommittee report that many fruitless exams are conducted because of ACS limitations. Unnecessary exams are conducted because of cumbersome procedures needed to override ACS when the system calls for an intensive exam. The inspector can only override such a designation if he/she has "inspector knowledge", which is often difficult to articulate, so fruitless exams continue to be a problem. On the other hand, because of lack of time (taken up in part by fruitless exams), supervisors have at JFK, and possibly other locations, overruled inspectors' orders to examine shipments, so necessary exams are not being done.

All too often, as day-to-day problems with the system occur, they are resolved on a case-by-case basis by the immediate or second level supervisor. Customs usually does not institutionalize the change into its operating procedure. The next time or place the same problem occurs, it may not be solved in the same manner. Furthermore, inspectors and import specialists are frequently caught between the different opinions of two supervisors. Therefore, one work station may not benefit from the work of another. This is characteristic of Customs' tendency to manage by

crisis rather than by planning and foresight, so potential problems can be eliminated before they become real crises.

NTEU concurs with the subcommittee's statement that other agencies which rely on Customs to enforce their laws are not being properly served. Inspectors are signing the licenses required by other federal agencies (e.g., Department of State, FDA, Department of Agriculture, Bureau of Alcohol, Tobacco and Firearms) without examining the merchandise. In many cases they are authorizing the restricted movement of freight without determining that the proper individual is actually taking possession of the freight. Take, for example, poppy straw, a controlled substance that requires a DEA permit to import. In the past an inspector was on site to see that the shipment was transferred by a proper agent of the permit holder. Today a blank transfer is signed in advance.

In addition to recognizing other agencies' interests, Customs assured that those agencies' requirements were met prior to release of the shipment. Now, as long as another agency is aware of the shipment, or the agency's forms are merely completed by the broker or importer, Customs will release the shipment if all Customs requirements are met, even though DOT or FDA places a hold on the shipment. The carrier can no longer depend on the Customs inspectors' release as evidence that a shipment has met all federal, state and local requirements.

One of the more disturbing aspects of the cargo examination program is that in many locations inspectors are only provided information on shipments that have been recommended for examination by the ACS. Where Automated Broker Interface (ABI) and Automated Manifest System (AMS) interface, a broker will input an entry into his ABI Computer, and if the entry is ordered as a general exam by ACS, the broker will be notified that he has 10 days to pay liquidated duties. ACS then will notify AMS that the cargo is cleared by Customs and may be delivered. All of this will happen with no opportunity for a customs officer to override for examination or document review.

Some of the problems with the use of AMS are:

1. It is unrealistic to assume that all carriers will eventually accomplish 100 percent compliance with the requirement for full and accurate disclosure of all cargo. Currently, ships arriving in port still amend their cargo manifest long after the vessel has discharged its cargo and left for another port.

2. The manifest review capabilities of AMS are limited, and do not include the critical field "marks and numbers" (identifications put on each box package by the manufacturer) as required by statute. Marks and numbers often disclose the actual origin of the freight, especially when the shipper is a freight forwarder.

3. Scanning capabilities are limited, and extremely slow due to system access time. Furthermore, the lack of ability to access both TECS (Treasury Enforcement Computer System) and ACS simultaneously means additional time wasted or two terminals tied up.

4. The ability to place system-wide holds on merchandise through the AMS system is overrated. It is unusual that enforcement information would be specific enough to be useful.

5. The inability of AMS to generate a status report of cargo for each particular vessel, and the inability to generate a GO (General Order) report except on the actual GO date (Sundays included), limit the ability to use the automated database to audit the carrier. This requires the district to either trust the carrier's records or maintain the original historical records including "posting copies" of all releases. This

negates any possible savings in manpower. (Note: Five working days after arrival of merchandise it must be transferred to a general order warehouse if no entry has been filed for its release.)

6. Assuming that AMS becomes fully implemented, terminal operators (i.e. all parties who interact with the ACS hardware, for example, brokers, shippers and importers) will be forced to interface with many incompatible carrier systems, costing them additional money. Failure to do so would require them to maintain a "paper trail" on each release, negating any gain from computerization.

Failure to give an inspector an opportunity to review an entry is a serious mistake. The General Accounting Office conducted a study on cargo exams in which GAO found that inspector overrides produced a 52% higher rate of discrepancies uncovered than did ACS criteria. (See Customs Automation, Cargo Examination Targeted by Automated Cargo Selectivity System, GAO/IMTEC - 89 - 59, June 1989). Also, drug seizures are most often the result of inspector override.

Finding Number 9: The U.S. Customs Service Centralized Examination Station program is poorly managed and vulnerable to fraud.

As stated in the subcommittee's report, the Centralized Examination Station (CES) program has not been properly evaluated by Customs since its inception. In addition to the subcommittee's concerns that there are of inequitable procedures for the selection of CES's and lack of controls to prevent overbilling of importers; but, NTEU believes, it also opens the door to wholesale circumvention of the trade laws.

In too many instances Customs fails to obtain control over the merchandise being produced for examination at the CES. For example, a container may arrive and be sent to a container freight station, an entry is filed and an inspector requests to examine a portion of the shipment. The broker sends a runner to pick-up the merchandise and deliver it to the CES for examination. The inspector has lost control of a significant aspect of the exam - being able to view the entire container and select at that time which portion he/she will examine. Even if the inspector designates which portion of the shipment he/she wants to examine, the inspector has no way of ensuring it was that portion which was delivered to the CES.

NTEU believes CES's should be used for full container strippings for enforcement purposes. It is ideal for those instances where an inspector has a tip that contraband is hidden within a particular container, or for a CET program in which a particular commodity is being targeted and full containers are brought to the CES. Otherwise, inspectors should be located at the bonded warehouses and container freight stations where they can function as the "cop on the beat", helping to prevent illegal activity by their presence.

Finding Number 10: The U.S. Customs Service methods for processing airline passengers are inefficient.

NTEU agrees that the preclearance program should be studied for possible expansion. Preclearance facilitates the operation of U.S. airports by alleviating some of the international air passenger traffic at the overcrowded U.S. facilities. To be effective, however, the program will need additional staff.

While cross-training of INS and Customs Inspectors can be beneficial, it would be unwise to presume an INS Inspector could be adequately trained in a short period of time to perform the full range of Customs Inspectors' duties. Customs laws are far more

diverse and complicated than INS laws. The INS Inspectors must merely determine admissibility by authenticating documentation. Customs Inspectors must be capable of exercising considerable judgment in identifying narcotics carriers, terrorists and others attempting to avoid the payment of duty, which can only be done effectively after many years of experience.

We would like to bring to your attention, Mr. Chairman, a change in Customs policy with regard to air passenger processing which has, ironically, resulted in a significant decrease in service to air passengers in some locations, in response to a legislative mandate designed to improve service.

In an effort to expedite the flow of air passengers, Congress established a 45 minute goal for passenger processing. Unfortunately, in some locations, such as Dulles airport, staff was actually reduced in response to the 45 minute goal.

Prior to the 45 minute requirement, Dulles personnel were clearing passengers in as little as 15 minutes. With the advent of the 45 minute rule, Customs eliminated previous ratios of passengers to inspectors and substituted the "supervisor's judgment." The result was a cut in service. Obviously, a cut in service in response to the 45 minute rule turns the provision on its head and should be addressed by this subcommittee.

Finding Number 11: The U.S. Customs Service cannot ensure that it is properly enforcing anti-dumping and countervailing duty orders issued by the Department of Commerce.

The most basic of our trade protections are the anti-dumping and countervailing duty laws, and in recent years U.S. industry has increasingly turned to these laws for relief from unfair trade practices. Both laws provide relief in the form of additional duties on unfairly priced imports. Dumping duties are imposed when sales of imported goods in the U.S. market are below the cost of production or cost in the home market. Countervailing duties are imposed to offset foreign government subsidies to their producers. The Commerce Department, upon petition by U.S. industry, computes the extra duties to be imposed on the imports of each foreign manufacturer, if the International Trade Commission has found injury to U.S. industry in the case.

The principal methods of circumvention are misclassification, improper description, and transshipment through third countries to conceal country of origin. As stated by the subcommittee, Customs has neither an adequate system for monitoring AD/CVD entries to determine if Commerce's orders are being properly enforced, or an enforcement program to guard against circumvention.

The root of this problem is the growing number of entries relative to the number of import specialists. A sufficient number of import specialists is required to give special enforcement attention to AD/CVD entries and look for evidence of circumvention. Under the entry summary selectivity (ESS) module of the ACS, entries that are misclassified may not hit against a criterion for import specialist review. The entry will be bypassed, and ultimately accepted as entered. With a 50 percent bypass rate, the corps of import specialists is barely able to handle processing all the trade sensitive entries requiring attention. Additional import specialists are required to override bypass criteria and examine other entries in similar classifications from the same manufacturer, and to uncover efforts to avoid payment of anti-dumping and countervailing duties. Suspect shipments can be designated for inspection, and evidence of fraud referred to Investigations. The action begins with import specialists, and there must be enough of them to make the necessary enforcement checks. A post-audit approach will not work because the damage to industry will be done if the goods enter the marketplace.

Conclusion

NTEU is pleased to participate in the oversight activities involving the U.S. Customs Service. As a representative of Customs employees, NTEU can provide the perspective of the people who do the jobs necessary to keep commerce moving, and who enforce our countries trade laws. Our activity is in response to their concerns and their desire to have the necessary tools and support to better serve the American public.

Thank you, Mr. Chairman for your support in this oversight effort. As you know, this is just a first step, as many of the abuses and mismanagement detailed in the subcommittee's report need to be remedied. We look forward to continuing to work with you and your staff on these important issues.

Chairman GIBBONS. Thank you, Mr. Tobias. I notice that you summarized your statement and we will put it all in the record though and I appreciate the important role that you, as a head of the union and representing those people, play in this whole process and certainly we want our laws enforced.

And as I said to other witnesses, if we have got some stupid ones let us deal with those and get them out of the way and so that we can build a faith and credit in the process of lawmaking and law abiding. It begins very simply with the proper enforcement of those laws that are on the books and your people are actively engaged in that so we want to work together to see that we can get better, more accurate enforcement of all the laws.

Mr. Frenzel, do you have some questions?

Mr. FRENZEL. I do.

I thank Mr. Tobias for his splendid testimony and have a couple of questions. In past years we have had difficulties with overtime in the Customs Service and partly that has been a function of a job load that is very hard to control and partly, at least in my opinion, it has been a function of improper management attention to a particular problem.

It has also been a function of perhaps insufficient appropriations so that more ceilings placed on hiring that the service could not get around.

Can you give us an up-to-date assessment of the overtime situation now?

Mr. TOBIAS. Well, I believe, Mr. Frenzel, that the reason that the overtime has been an issue is because Customs has, in fact, been understaffed. But even if Customs were fully staffed, because of the demands, both in shipping of cargo and the arrival of passengers at odd hours, it makes economic sense to supply that service to those who want it and those who need it through overtime.

Now, the Customs Service recently, in the last 3 or 4 months or so, has attempted to reduce the amount of overtime by increasing the number of regularly scheduled shifts.

I believe that has not solved the problem of speeding the processing of cargo or increasing the ease of passengers coming into the United States, mainly because there are not enough people to go on the newly established shifts, and, second, it has increased the cost out of the general appropriations more than it would if overtime were used.

So, I think it is an unwise approach that the Customs Service has taken recently.

Mr. FRENZEL. Well, as you know, the Congress has occasionally laid overtime restrictions on the Service because of what we thought was excessive reliance on overtime. There have been morale problems in the Service, some people thinking they have more overtime assigned than they can stand and still have good family life, junior employees thinking their not getting their share of the overtime.

Do you think that we should continue with restrictions on overtime?

Mr. TOBIAS. I think Commissioner Hallett has urged to increase the cap to $35,000, and I believe that that would be wise. It would give more flexibility, particularly in the large ports like JFK,

where the number of arriving passengers is so great and the amount of cargo coming in is so great, that it would give more flexibility to allow the payment of overtime where necessary.

So, we support Commissioner Hallett's suggestion of increasing the cap to $35,000.

Mr. FRENZEL. Thank you. As you know, some of our overtime is paid on the basis of a law written before World War I. I do not suspect that the employees organizations have changed their position about their willingness to repeal that law.

Mr. TOBIAS. Well, I think the law—the 1911 law—is sound in concept because the original idea of the law was that those who desire the service past the normal duty hours would pay for it and I think that makes sense philosophically and in concept.

Mr. FRENZEL. Do you think it makes sense to pay a couple days pay for an hours work?

Mr. TOBIAS. Well, I think it would make sense if you measure the amount that is paid in relation to what others who are performing the same kind of work are paid. And I think it makes a great deal of sense when you look at the disruption in a customs inspector's life that is associated with being a customs inspector.

I had the experience actually, long before I became president of NTEU. When I was very young there was a customs inspector who lived across the street from me and I became very familiar with the life and the role of a Customs inspector. It is one where you cannot plan because you never know when you are going to be called out, you are working—you are constantly working on Saturdays and Sundays, you are working late hours and I think that the amount of pay that they receive is fair in comparison to the disruption in the life that is caused.

Mr. FRENZEL. Thank you. As far as I know those people are still volunteers, none of them impressed into service are they?

Mr. TOBIAS. Well, that is not actually correct. The way overtime is allocated is on a rotating basis and there is a real attempt to equalize overtime so that those—so that all people are pressed into service on a regular basis and you accept that as part of the job.

Mr. FRENZEL. Thank you very much for your testimony.

Mr. Chairman, I yield my time.

Chairman GIBBONS. Thank you, sir.

Mr. TOBIAS. Thank you.

Chairman GIBBONS. We next have a panel of the Air Transport Association, Airport Operators Council International, Air Couriers Conference of America, and the International Association of Airport Duty Free Stores.

Mr. Landry, Mr. Gordon, Mr. Ambrose, and Mr. Bernstein.

Well, let us see, which one of you gentlemen is supposed to go first? We have got Mr. Landry listed as first, but I am not sure that is the way you want to go.

Go right ahead, Mr. Landry.

STATEMENT OF JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA

Mr. LANDRY. That is fine, Mr. Chairman.

My name is Jim Landry, I am the senior vice president and general counsel of the Air Transport Association. My prepared statement has been submitted to you and I request that it be included in the record of this timely hearing on the commercial operations of the U.S. Customs Service.

In these few minutes I would like to highlight and update the major points which the Nation's scheduled airlines wish to bring to your attention.

In a nutshell, the situation is ominous. The good news is that the growth rate of international air traffic to and from the United States continues to be spectacular—an increase of nearly 50 percent in the past 3 years. But the bad news is that if the Customs staffing plans and the adminstration's 1991 budget are put into place, it will further aggravate serious congestion at air terminals, cause unnecessary disruptions for travelers, and make air travel far less efficient.

The capacity of our Federal inspection system is already strained by the demands of today's traffic. During that 3-year period of 50-percent traffic growth, Customs has been obliged to handle the traffic with a static work force.

To its credit, the Customs Services has attempted to cope with the problem in a number of innovative ways. Their airport of the nineties initiative entails computerization of the admissions process, and greater emphasis on selectivity—both by the separation of high-risk and low-risk flights and by the profiling of passengers to identify potential violators.

We commend these Customs initiatives. We particularly applaud their enhanced spirit of cooperation with the private sector and with other Federal agencies such as the INS, which holds great promise for streamlining the inspection of bona fide travelers, particularly those possessing machine-readable documents. But, as my prepared statement spells out, we see great pressures building on our major gateways such as New York, Miami, and Los Angeles. And, we face an acceleration in the creation of new gateways—not only because of congestion at the traditional gateways, but also in implementing new international aviation policies established by the Department of Transportation.

That triggers a classic robbing-Peter-to-pay-Paul syndrome, as Customs spreads its strained resources—a fact of life that we already were experiencing as airport staffing played second fiddle to the Customs commitment to its enforcement mission at the Southern land border.

That is why we are urging you to fine tune the 1985 COBRA legislation by concurring with changes-already adopted by the Senate-designed to ensure that a $35 million annual surplus in the user fee account is spent for additional Customs inspectors and equipment, and to extend authorization for the account for 15 years.

Thirty-five million dollars—that translates to hiring up to 700 new officers or providing a mix of personnel and automation that will quickly reduce the scale of the problem. For the foreseeable future, that means the resources made necessary for the provision of the adequate services mandated by COBRA.

The shortcomings of Customs resources on the passenger side are not the only potential problem we wish to bring to your attention.

On the cargo side, proposals have been made to replace or modify today's ad valorem user fee structure, a structure heavily criticized in a GATT panel decision of a few years ago.

Unfortunately, the Customs recommendations of a modified ad valorem fee schedule or a transaction-based schedule both entailed unrealistically high charges for informal shipments, such as packages forwarded through express courier services. Fees as high as $16 for such shipments would only produce one result—discouragement of the use of such courier services.

Moreover, as we believe those proposed fees are far too high in relation to the processing costs actually incurred by Customs, we believe they would be equally GATT-incompatible.

Incredibly, the transaction based alternative would have added an inbound fee as high as $9 to the initial entry fee in cases where goods arrive at a major U.S. airport and are moved to an interior distribution center for clearance and handling. Again using the example of the informal entry, Customs would have received up to $25 for each package, despite huge shipments being cleared now through use of a single consolidated entry.

If the fee system is retained, ATA recommends adopting the changes to the ad valorem structure which this committee approved last year—retention of the 0.17 percent charge, application of a reasonable fee cap to expensive items, and no charge for informal entries. We were pleased to learn that the full Senate, last week, adopted language quite close to yours. We urge you to make certain that those features are retained in the conference when it occurs.

Last, we are enthusiastic about the Customs Services' moves to modernize its commercial cargo processing systems. We support the proposed revision of the Tariff Act to permit electronic filing and amendment of our cargo manifests.

The automated manifest system and the automated broker interface prompt us to look forward to a day of paperless entry for all of our inbound commercial cargo. And we would be extremely interested in a statutory authorization of national entry processing, in order to centralize the entry of our aircraft or repair parts. And, we strongly support an increase in the duty exemptions for returning citizens and residents. Together with the great strides which the industry, Customs, and INS are making in the development of advanced passenger or information systems, that could mean that a large percentage of international air passengers will be processed and cleared before they arrive in the United States.

In conclusion, we ask for this committee's immediate attention to two key issues—the $35 million COBRA surplus and the ad valorem fee schedule. If you adopt our suggestions you will help assure the continued healthy growth of the airline industry without any increase in appropriations. Most importantly, you will provide tangible benefits to the traveling and shipping publics, and encourage growth in our international trade and tourism.

ATA stands ready to assist you and your staffs in resolving the issues we have discussed today, and any other matters of interest to the committee.

Thank you, Mr. Chairman.

[The statement of Mr. Landry follows:]

Statement of James E. Landry
Senior Vice President and General Counsel
Air Transport Association of America
At the Hearing on May 3, 1990
Before the House Subcommittee on Trade
Committee on Ways and Means
ON THE COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

My name is James E. Landry, Senior Vice President and General Counsel for the Air Transport Association of America (ATA). ATA members carry over 95 percent of the scheduled airline traffic in the United States, and serve more than 80 other countries.

We appreciate this important opportunity to submit our views on the Customs Service's ability to provide adequate staffing for the inspection of passengers and cargo at international airports. Unfortunately, the situation is not good; if Customs' staffing plans and the Administration's 1991 budget are put into place, it will further aggravate serious congestion at air terminals, cause unnecessary disruptions for travellers, and make air travel far less efficient.

INSPECTOR STAFFING AT AIRPORTS

According to estimates provided by the U. S. Travel and Tourism Administration, the number of international passengers travelling by air to the United States has grown by nearly 50 percent since 1986. This growth is straining a federal inspectional system that has been characterized as the least facilitative of any major nation.

The Customs Service has attempted to cope with this problem in a number of innovative ways, despite being held to the same personnel levels over the three year period. Under the aegis of their "Airport of the '90s" initiative, the Service has taken steps to computerize the admissions process, to separate flights into high risk/low risk categories, and to turn to a "profiling" technique for identifying potential violators. These actions, which have been closely coordinated with the air transport industry and other federal agencies such as the Immigration and Naturalization Service (INS), hold extraordinary promise for streamlining the inspection of *bona fide* travellers, particularly those who are in possession of machine-readable documents.

Notwithstanding these innovations, Customs has been unable to keep pace. This is due to three trends that show no signs of diminishment. First, the enormous growth in international traffic has placed additional pressure on Customs to supply a sufficient number of officers for the major gateways to the U. S.--ports such as New York, Miami and Los Angeles that have traditionally accounted for most of the international air passenger traffic.

Second, many new international destinations have been created or expanded in response to the congestion at larger airports. With no new positions available to staff these sites, Customs is forced to spread existing resources and thereby reduce its presence at the major airports, creating a vicious circle that further downgrades services. In light of the Department of Transportation's new policy that encourages foreign carriers to develop routes between their hubs and unserved U. S. cities, it is clear that Customs' service and enforcement missions will continue to erode at an even greater rate.

Finally, Customs is choosing to emphasize its commitment to its enforcement mission at the southern land border by assigning additional staff there. Again, this is being accomplished to the detriment of the air traveller, since Customs can only do this by eliminating airport staff.

ALTERNATE SOURCES OF FUNDING

Ironically, this deterioration has occurred despite the existence of a funding mechanism that would go a long way toward resolving the staffing problem without having to increase appropriations. This mechanism is the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), which authorizes the collection of user fees from each passenger arriving from overseas embarkation points.

The COBRA legislation is clearly intended to serve as the means to provide the support that the air transport industry finds so lacking. Section 13031(e)(1) states unequivocally that "the customs services required to be provided to passengers upon arrival in the United States shall be adequately provided in connection with scheduled airline flights at customs serviced airports when needed and at no cost...to airlines and airline passengers." Since this provision was conceived, air carriers have expressed concern to Congress that the revenues would have to be applied in the form of Customs staff increases if passengers were to receive "adequate" services. As noted above, this has not occurred.

It is unfortunate that the Administration has chosen to interpret the statute's language in a way that does not permit Customs to add desperately needed airport staff, despite a healthy surplus in the fee account. The current COBRA fee system will generate $150 million this year from all sources, over $100 million of which is paid by air passengers. As in the past four years, a portion of the $150 million will be used to pay overtime for officers stationed at both air and land border ports, and to pay for officers located at preclearance sites abroad. After these requirements have been satisfied, at least $35 million will be held in surplus.

Some have taken the position that the fee account is poorly constructed, and should be redrafted to mirror a similar account administered by INS. The provision under which INS operates directs all revenues into airport and seaport operations, and has enabled that agency to nearly triple airport staff in the past three years. The proven success of this approach suggests to ATA that it may offer the best funding mechanism available.

In view of current budgetary realities, however, ATA recognizes that the perfect can be the enemy of the good. Therefore, at this time we support minor revisions to the existing statute to better assure adequate airport staffing levels. To that end, we strongly urge the committee to concur with the changes to COBRA that have been endorsed by the Senate Finance Committee. Briefly, this language clarifies the original purpose of the legislation by stipulating that the remaining $35 million be spent on Customs inspectors and equipment, and extends authorization for the account for fifteen years.

There is no doubt that these alterations would have a dramatic impact; the sum could allow the hiring of up to 700 officers, or provide a mix of personnel and automation that will quickly reduce the scale of the problem. For the foreseeable future, Customs would be relieved from the impossible decisions required of them when resources simply do not exist for the task at hand.

COLLECTION OF FEES ON COMMERCIAL CARGO SHIPMENTS

As you know, another fee was enacted shortly after the passenger fee was set up: the *ad valorem* charge for the processing of "formally entered" merchandise. In general, this system has not caused major problems for the air carriers; however, a GATT panel ruling has led to a number of efforts to revise the structure for the fees. ATA is concerned that some of the proposals will lead to unrealistically high charges for certain services, and thereby discourage their use.

One particularly worrisome recommendation has been advanced by Customs. The agency proposes the adoption of either a modified *ad valorem* user fee schedule, or one that is transaction-based. In both cases, a charge as high as $16 may be levied on "informal" shipments, which account for over 30 percent of the volume and are typified by packages forwarded through express courier services.

We believe this new fee is too high in relation to the processing costs actually incurred by Customs. This is especially true in the case of those cooperating carriers who have developed systems to process high volumes of informal entries. As these systems serve to reduce Customs' costs as well, we find no rational basis for the fee level.

Without implying endorsement of the *ad valorem* fee schedule, ATA views the transaction-based alternative as even less desirable. Under this scheme, another "in-bond" fee as high as $9 would be added on top of the initial entry fee in cases where goods arrive in the U. S. at a major port and are moved to an interior distribution center for clearance and handling. Again using the example of the informal entry, Customs would receive up to $25 for each package, despite huge shipments being cleared now through use of a single consolidated entry.

If revisions are made that include such unjustifiably high charges, it is likely that the fee structure will be found incompatible with the GATT again. Furthermore, it will severely restrict growth in the segments that suffer a disproportionate share of the burden.

If Congress chooses to retain the fee system, ATA recommends that the charges be more closely aligned to the actual expenses incurred by Customs in processing each category of merchandise. We believe that this goal is best accomplished through the changes to the *ad valorem* structure that were approved last year by this committee: retention of the .17 percent charge, a reasonable fee cap on expensive items, and no charge on "informals."

MODERNIZATION

ATA is encouraged by the Customs Service's efforts to quickly address the deficiencies in its commercial cargo processing systems. As one of the Service's newest business partners in the Automated Commercial System, the airline industry supports the proposed revision of the Tariff Act to permit electronic filing and amendment of vessel and aircraft cargo manifests. We envision major facilitation benefits through the use of the Automated Manifest System and the Automated Broker Interface for clearance of inbound commercial cargo, and we look forward to the day when the costly processing of paper documents is no longer required by statute.

The airlines are also very interested in any proposal to provide statutory authorization of National Entry Processing. U.S. carriers which serve multiple gateways in this country could reduce costly maintenance delays and simplify their logistical support systems if they could use such a provision to centralize entry of critical aircraft repair parts.

Third, we strongly support an increase in the duty exemptions for returning citizens and residents, as this would further facilitate the processing of arriving international passengers. Coupled with the advance passenger information systems that we are developing with Customs and INS, this provision would make it feasible for a large percentage of air passengers to be processed and cleared prior to their arrival in the U. S.

These are only three examples of the many Customs Modernization Act proposals in which the air industry has significant interest. In view of the economic impact these potential changes would have on our international business, we anticipate the Administration's package with great interest and intend to participate actively in the legislative process.

CONCLUSION

ATA asks that the committee give immediate attention to two key issues: the $35 million COBRA surplus, and the *ad valorem* schedule. Our suggested modifications to these user fees are critical to the healthy growth of the air transport industry, yet will not require any increase in appropriations. Most importantly, the changes will provide a tangible benefit to the travelling public, and serve to encourage growth in international trade and tourism.

Thank you, Mr. Chairman, for this opportunity to present our suggestions. We look forward to working with you to resolve the issues we have discussed today, and offer the assistance of ATA on these and other matters of interest to the Committee.

Chairman GIBBONS. Thank you, Mr. Landry.
Mr. Gordon.

STATEMENT OF JAMES K. GORDON, DIRECTOR, INTERNATIONAL AFFAIRS, AIRPORT OPERATORS COUNCIL INTERNATIONAL

Mr. GORDON. Thank you, Mr. Chairman, members of the subcommittee. We thank you very much for this opportunity to present the concerns of the Airport Operators Council International and the communities they represent.

I want to keep my remarks as brief as possible this morning so I will depart from my formal statement.

The Customs Service's operations are very significant to us. The efficiency and effectiveness of the Customs Service are important to the United States but they are also vital to our airports' ability to provide access for our communities to the international air transport system.

Rapid and effective Customs processing maximizes the utility of very scarce capacity of the U.S. airports and it give positive benefits for tourism business, travel, and trade and goods.

We would like to commend both subcommittees and their staffs, and especially Oversight staff member Tom Arnold, for the 2-year investigation of Customs commercial operations.

We appreciate having had the opportunity to contribute to the investigation through testimony here in Washington and in contact between airport operators and oversight investigators across the country.

The investigative record is an excellent one and the 16 Oversight Subcommittee findings are right on target, we think.

AOCI endorses the Oversight Subcommittee recommendations for action or legislation, especially those regarding the processing of airline passengers.

However, Mr. Chairman, we also ask that both subcommittees intervene to help achieve fundamental improvements in Customs Service operations.

We believe that the legislative reform effort is a most useful one and we would like to see that go through.

Commissioner Hallett has emphasized that she wants a balance between commercial operations and enforcement and she takes an open and constructive approach to solving problems. Her personality and management style should go far in rectifying many of the past problems.

It seems apparent to us, however, that curing the examples of abuses and mismanagement, as found by the Oversight Subcommittee in Customs operations is only part of what is needed.

Even if the waste of resources is ended, the Customs Service still has insufficient staff and funds to fulfill its responsibilities for assessing and collecting duties and other revenues, processing passengers, baggage, cargo, and mail, and enforcing the laws.

It is paradoxical that the Customs Service, the second largest collector of revenues for the U.S. Government, lacks the staff and resources to collect more revenues.

Our Government needs to address the Federal deficit but we also need to enhance our revenue collection and ensure that those who pay user fees receive the full benefit of those fees.

Our testimony in recent years must have seemed a litany of complaints and demands for more staffing and more spending from the ever scarcer Federal revenues, but we now feel the situation has become critical.

Many American cities are seeking their first new international airline services and other cities that already have international service are trying to expand their international access.

However, this year, none of those cities will be successful unless the Customs Service takes away inspection staffing from a city that needs that staffing for its existing international trade and tourism.

Over the last year there have been several cases where Customs actually considered denying landing rights to U.S. and foreign airlines, after the State Department had negotiated an agreement with another country to allow those new services.

This could have impeded the development of new air services at Cincinnati, San Jose and Los Angeles, for example.

But in addition to jeopardizing our future international trade and tourism, inspection processing creates severe delays and congestion at many airports. The lines and delays this summer will be the worst in memory at many U.S. airports of entry.

In this context, Mr. Chairman, we would like to mention the resources available for air passenger inspections. The $5 user fee to be collected from all transoceanic air passengers will generate about $115 million in revenues in fiscal 1990.

The COBRA legislation allows these revenues to be used only to pay the cost of inspection overtime and the excess costs of pre clearance, leaving an annual surplus of over 30 million, perhaps $35 million.

A partial solution to this problem, to authorize the use of the surplus for Customs to hire more inspectors, is included in the Senate version of H.R. 1594, which will go to conference in the next week or two we hope.

We hope that this committee's members will support the solution in conference. However, sir, we also hope that the subcommittee will note that 22 million transoceanic passengers are paying for overtime service not only for themselves, but for 18 million air passengers arriving from Canada and Mexico and the contiguous countries, as well as for over 343 million persons arriving at U.S. land borders.

It is extremely upsetting, Mr. Chairman, that the air passengers are paying 70 percent of all COBRA user fee revenues and benefit from about 10 or 15 percent of spending from those revenues.

Mr. Chairman, the air passengers deserve adequate inspection service, they pay for it, but they do not get it. When we ask for more inspectors for airports we are told there is not money to pay for them. We suggest there is money for inspectors at airports and if more revenue is needed the user fee should be extended to those air passengers now exempted. The extended user fee might even be reduced everywhere to $4 and Customs still would collect $50 million more in revenues.

The current exemption makes no sense, because a $4 or a $5 user fee makes little difference compared to the price of travel and lodging. We urge the subcommittee to consider further reform of the COBRA user fees.

The Oversight Subcommittee has made many recommendations for improvements in Customs Service management practices. We believe that until Customs Service managers recognize that the public has a right to know where and how its resources are spent, Customs will be less effective and more caught up in political squabbling.

Customs needs a rational, defensible method of allocating its personnel and funding and needs to let the industry understand both the method and the allocations. When they begin to operate openly and honestly, they will have much greater public support for their programs.

Our testimony for the record addresses, in detail, many of the oversight findings and recommendations. I would like to speak in particular about one of them.

Oversight finding No. 10 is that Customs methods for processing airlines passengers are inefficient. In particular, the Oversight Subcommittee recommends expansion of Customs preclearance.

AOCI believes that Customs and Immigration preclearance can be a useful tool for relieving congestion in high-volume low-risk traffic markets.

However, if the Customs Service must enforce U.S. laws at the preclearance points, the initiative will be doomed when other nations insist on preserving their sovereignty.

We believe the purpose of Customs enforcement is to protect our Nation from contraband and illegal substances and that simply excluding those substances, or contraband should be satisfactory. Customs' objectives should not be to notch up more arrests.

Where the United States is unable to establish congruence with foreign laws, Customs should work with local law enforcement and air carriers to protect the U.S. interests.

Mr. Chairman, the Oversight Subcommittee recommends implementation of procedures so that international passengers can be cleared within 45 minutes after arrival. Customs has been very responsive to committee report language on this issue in the past, but the Federal inspection process still results in significant delays at many airports of entry. We believe that a legislative requirement for 45 minute Federal clearance is necessary to facilitate the international transportation, travel, and tourism of the United States.

In conclusion, sir, for U.S. airports, the operations of the U.S. Customs Service are a capacity issue and a matter of the quality of service provided to the public.

We hope that the Ways and Means Committee will closely examine the statutory and policy requirements that establish Customs responsibilities and provide the resources needed to protect our economy and our citizens.

And we hope you will join us in supporting the work of Commissioner Hallett and her staff.

Thank you, sir.

[The statement of Mr. Gordon follows:]

AIRPORT OPERATORS COUNCIL INTERNATIONAL

Statement of
James K. Gordon
Director, International Affairs
Airport Operators Council International

regarding findings and recommendations resulting from the Subcommittee on Oversight's investigation of the commercial operations of the U.S. Customs Service, and regarding legislative proposals to modernize and reform Customs' trade operations

before the
Subcommittee on Trade,
Committee on Ways and Means,
U.S. House of Representatives

May 3, 1990

- AOCI represents the governmental bodies that own and operate the principal airports served by scheduled airlines in the United States and in 40 countries around the world.

- AOCI Member airports enplane more than 90 percent of total domestic and virtually all international scheduled airline passenger and cargo traffic of the United States.

- AOCI's international Member airports enplane two-thirds of all airline passengers and cargo on six continents.

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(First line of message should read: "MAILBOX TO AOCI")

Mr. Chairman, Members of the subcommittee, we thank you for this opportunity to present the concerns of the Airport Operators Council International and the communities we represent, regarding the commercial and trade operations of the U.S. Customs Service.

The Airport Operators Council International represents the local, regional or state authorities that own and operate the U.S. airports serving virtually all U.S. scheduled international air passenger and cargo traffic. AOCI's Member airports and their communities make billions of dollars of capital investments each year to expand the capacity of our nation's airports, to reduce delays and increase access to the air transportation system, to maintain and promote the growth of healthy local economies and a stronger national economy.

The Customs Service's operations are significant to us. The efficiency and effectiveness of the Customs Service are important to the United States, but they are also vital to our airports' ability to provide access for our communities to the international air transport system. Rapid and effective Customs processing maximizes utility of the scarce capacity of U.S. airports, and creates positive benefits for tourism, business travel and the trade in goods.

AOCI commends this subcommittee and the subcommittee on oversight for the two-year investigation of Customs' commercial operations. We appreciate having had the opportunity to contribute to the investigation through testimony here in Washington and in contacts between airport operators and oversight investigators during visits all over the country. The investigative record is an excellent one, and the 16 oversight subcommittee findings are right on target.

Mr. Chairman, AOCI endorses the oversight subcommittee's many recommendations for action or legislation, especially those regarding the processing of airline passengers. However, Mr. Chairman, we also ask that the subcommittee intervene to help achieve fundamental improvements in Customs Service operations. We ask that you require:

- greater responsiveness in Customs' spending of user fees to meet the needs of those who pay the fees;
- firm adherence by Customs managers to principles of accountability and transparency in the application of personnel and funds;
- clear recognition by Customs of the connection between its duties and the government's constitutional duty to promote the general welfare and economic well-being of the nation.

The last two years probably are a watershed for the Customs Service, and the Ways and Means Committee deserves much credit for the improvement. Over the last two years, Congress, the business community and the air transport industry began to take a hand in putting the Customs Service back on track. The new Commissioner has emphasized that she wants a balance between commercial operations and enforcement, and takes an open and constructive approach to solving problems. Commissioner Hallet's personality and management style should go far in rectifying many of the past problems.

It seems apparent to us, however, that curing the examples of "abuses and mismanagement" found by the oversight subcommittee in Customs operations is only part of what is needed. We all share the belief that the best way to run any organization is to establish the mission and broad methods and then provide enough resources to get the job done. Even if waste of resources is ended, the Customs Service has insufficient staff and funds to fulfill its responsibilities for assessing and collecting duties and other revenues, processing passengers, baggage, cargo and mail and enforcing the laws. It is paradoxical that the U.S. Customs Service, the second-largest collector of revenues for the U.S. government, lacks the staff and resources to collect more

Customs Service, the second-largest collector of revenues for the U.S. government, lacks the staff and resources to collect more revenues. Our government needs to address the federal deficit, but we also need to enhance our revenue collection and ensure that those who pay user fees receive the full benefit of the fees.

Now, despite the increased attention we're all focusing on Customs, and the new Commissioner's enthusiasm for getting the Customs Service in order, the lack of adequate resources threatens our nation's trade and tourism. Commissioner Hallet's good will and intentions will not be able to solve the worst problems of the Customs Service without new resources. Our testimony before this subcommittee in recent years must have seemed to you a litany of complaints and demands for more customs staffing and more spending from the ever-scarcer federal revenues, but we now feel the situation has become critical. Many American cities are seeking their first new international airline service, and other cities that already have international service are trying to expand their international access. However, this year none of those cities will be successful, unless the Customs Service takes away inspection staffing from a city that needs that staffing for its existing international trade and tourism. Over the last year, there have been several cases where Customs actually considered denying landing rights to U.S. and foreign airlines after the State Department had negotiated an agreement with another country to allow the new airline services, impeding the development of new air services at Cincinnati, San José and Los Angeles.

In this context, Mr. Chairman, we would like to discuss the resources available for air passenger inspections. Under the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, the Customs Service collects a $5 user fee from all trans-oceanic air passengers. This fee will generate about $115 million in revenues in fiscal 1990. The COBRA user fee legislation allows these revenues to be used only to pay the costs of inspection overtime and the excess costs of preclearance, leaving an annual surplus of over $30 million. A partial solution to this problem, to authorize the use of the surplus for Customs to hire more inspectors, is included in the Senate version of H.R.1594, which will go to conference in the next week or two, and we hope that this Committee's members will support this solution in the conference. However, we also hope this subcommittee will note that the 22 million trans-oceanic passengers who pay the passenger user fee are paying for overtime service for the 18 million air passengers arriving from Canada, Mexico and the "contiguous countries," as well as for over 343 million persons arriving at U.S. land borders. It is extremely upsetting, Mr. Chairman, that the air passengers are paying 70 percent of all COBRA user fee revenues, but benefit from only 10 or 15 percent of spending from the user fees.

Mr. Chairman, air passengers deserve adequate inspection service. They pay for it but they don't get it. When we ask for more inspectors for airports, we're told there isn't money to pay for them. We suggest there <u>is</u> money for more inspectors at airports, and if more revenue is needed, the user fee should be extended to those air passengers now exempted. The extended user fee might even be reduced everywhere to $4, and Customs still would collect $50 million more revenue. The current exemption makes no sense, because a $4 or $5 user fee makes little difference compared to the price of travel and lodging. We urge the subcommittee to consider further reform of the COBRA user fees.

ACCOUNTABILITY AND TRANSPARENCY

The oversight subcommittee has made many recommendations for improvements in Customs Service management practices. We believe that until Customs Service managers recognize that the public has

a right to know where and how its resources are spent, Customs will be less effective and more caught up in political squabbling. Customs needs rational, defensible methods of allocating its personnel and funding, and needs to let the industry understand both the methods and the allocations. When they begin to operate openly and honestly, they'll have much greater public support for their programs.

That public support should be another key target for Customs. It is not clear to the public that Customs shares or understands the public's for trade and travel. The Commissioner, as a recent arrival from outside the bureaucracy, has the right approach, but many Customs officers and even relatively senior managers believe that they know better than the public what the public needs and wants. The Customs Service is two hundred years old, dating back to the formation of our nation. They should remember that an unresponsive Customs Service was one of the reasons for the Declaration of Independence. They should be reminded that our nation has always placed the highest value on trade and freedom of movement.

OVERSIGHT FINDINGS AND RECOMMENDATIONS

Many of the findings and recommendations of the oversight subcommittee address these systemic problems. We would like to discuss briefly some of these.

Oversight finding number 1 refers to relations between Customs and the trade community, and makes salient reference to the enforcement mentality. Airport operators across the country can testify to this, and not simply because of any failure to cure the problem of passenger processing delays. As you can imagine, airports and airlines must respond to the need for aviation security. The Federal Aviation Administration regulations specify in detail how an airport must protect the public and the aviation facilities at an airport, and the regulations include stiff penalties if the airport fails to comply. In the case in point, the airport must have an access control system, and must require all persons on the ramp to wear an approved airport security identification credential. Customs obviously is entitled to its concern that other parties might try to determine where and when it meets its enforcement responsibilities, but the airports' security programs do not restrain Customs' activities. For years, Customs has neither worked out an arrangement with the FAA nor satisfied the regulations governing all persons at airports. A summary of conflicts between airport security personnel and Customs and other agency officers, prepared in December, is submitted as Attachment 1 to this statement.

Another example of a lack of candor regarding Customs operations has been the failure of the Treasury Department and the Customs Service to provide any detailed information regarding the basic staffing and budget issues affecting Customs to the Treasury Department's Public Advisory Committee on the Commercial Operations of the U.S. Customs Service.

Oversight finding number 2 refers to the shift in emphasis from commercial operations to enforcement. We are pleased with Commissioner Hallet's promise to strike a balance between enforcement and commercial operations, and believe that there is no contradiction between effective enforcement, efficient revenue collection and facilitation of trade and travel. We support the recommendations for action and legislation.

Oversight finding number 5 discusses serious flaws in Customs' Automated Commercial System. Our concern is that, while Customs' operations are central to the process of bringing goods into the United States, the ACS is designed without taking account of the many information transactions required between carriers, brokers, importers, forwarders, warehouse operators and financial

institutions. The bilateral transactions between Customs and each of the other parties in the process are a minority of the information transactions, and the ACS' only effect to date on the other parties' transactions has been to complicate them.

Oversight finding number 10 is that Customs' methods for processing airline passengers are inefficient. The oversight subcommittee correctly noted that passengers must be cleared by both Customs and the U.S. Immigration and Naturalization Service. At many ports of entry, the Agriculture Department, the Public Health Service and Fish and Wildlife Service are also involved. Customs and the other federal inspection services have paid close attention to the problem of rapidly and effectively processing a growing volume of air passengers, and Customs last year played the leading role in developing a new strategy for air passenger processing. Nevertheless, air passenger processing is only marginally improved, and severe delays are common. Admittedly, other agencies' resources often constrain solutions, but Customs should, as the oversight subcommittee recommends, continue to work with the other agencies to improve the processing time. Because of resource scarcity and the lack of fundamental inspection processing changes, the Summer peak travel season of 1990 will be marked by some of the worst delays and congestion at airports within memory.

The oversight subcommittee recommends expansion of Customs preclearance operations. AOCI believes that customs and immigration preclearance can be a useful tool for relieving congestion in high-volume, low-risk traffic markets. However, if the Customs Service must enforce U.S. laws at the preclearance points, the initiative will be doomed when other nations insist on preserving their sovereignty. We believe that the purpose of Customs enforcement is to protect our nation from contraband and illegal substances, and that simple exclusion of the substances or contraband is satisfactory. Customs' objectives should not be to notch up more arrests. Where the U.S. is unable to establish congruence with foreign laws, Customs should work with local law enforcement and air carriers to protect the U.S. interest.

The oversight subcommittee recommends implementation of procedures so that international passengers can be cleared within 45 minutes after arrival. Customs has been very responsive to Committee report language on this issue, but the federal inspection process still results in significant delays at many airports of entry. AOCI believes that a legislative requirement for 45 minute federal clearance is necessary to facilitate the international transportation, travel and tourism of the U.S.

CONCLUSION

For U.S. airports, the operations of the U.S. Customs Service are a capacity issue and a matter of the quality of service provided to the public. We hope the Ways and Means Committee will closely examine the statutory and policy requirements that establish Customs' responsibilities, and provide the resources needed to protect our economy and our citizens. We hope you will join us in supporting the work of Commissioner Hallet and her staff.

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ATTACHMENT 1

AIRPORT OPERATORS COUNCIL INTERNATIONAL

12/4/89

Summary of Airport Response
to an AOCI inquiry on the issue of
Federal agents requiring airport identification

In brief, the issue involves principally U.S. Customs Service officers, although INS, DEA, Agriculture and others were also identified. Many refuse to wear airport identification, and quote Customs (or other agency) policy in claiming they are not required to wear local airport-issued ID, and will refuse to show their ID to anyone except law enforcement officers.

Virtually all airports responding to our inquiry report varying degrees of threats and intimidation by federal agents, ranging from threat of immediate arrest of any who challenge them, threat of legal or administrative action which would jeopardize employment or immigration status, forcible entry past on-duty guards, and in several cases, brandishing of weapons.

To quote from Customs Service letters to several airports:

"Customs officers will only show proof of status as law enforcement officers to other law enforcement officers in order to gain access to restricted areas at airports. Customs officers are not required to wear airport issued identification cards."

This is in direct contradiction to the FAA policy which requires badged employees to challenge anyone not wearing an airport ID. Indeed, the responsibility of the airport operator and his authorized, badged personnel to do so is specifically acknowledged in the same Customs Department letters quoted above. Yet the letters go on to state that:

"...we cannot allow those efforts (to tighten airport security) to hinder our personnel in the performance of their duties," or

"we cannot permit a situation to exist where private citizens employed at (airport) ... are permitted or encouraged to challenge a Customs officer not wearing airport identification."

This summary intentionally does not identify the responding airports at their request, because several have indicated that when such issues are raised with their local Customs officials, virtually all special handling requests are denied for months thereafter, and passenger throughput and processing time slows

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(First line of message should read: "MAILBOX TO AOCI")

down as much as 30 percent for lengthy periods. The reporting airports are of the opinion that these are retaliatory actions.

Respondents point out that in the great majority of cases where an airport or tenant employee may be the target of a federal investigation, it is common practice for the investigating enforcement agency to create a business "front" to legitimize the agent's presence on the AOA. Thus, there is no reason for the agent, posing as an employee of that business, to avoid an airport identification card. Indeed, the only person subject to challenge on the AOA by authorized employees is one without a badge, or with a badge which appears inappropriate for the area in which the challenge occurs. In either case, the most responsive, low-profile, and unchallengeable solution is to simply wear an appropriate airport-issued badge.

Many airports report what one characterized as "ugly incidents" in which, for example:

- an agent attempting to gain access at a manned gate stated that he "did not need to show (guard) any airport identification, so open the f...ing gate."

- an agent refused to be screened, pinned an employee against the wall, drew his weapon, and advised the employee to leave him alone. This agent was ultimately considered by the airport to be an unacceptable risk, and was denied all access.

- officers challenged when "tailgating" an airport employee's legitimate access to the AOA, patted their weapons, stating "this is all the ID I need".

- five agents, challenged when tailgating a legitimate AOA access, claimed "we are in charge of this airport", and indicated the (federal LEO) badge was the only ID required.

- agents confronted a foreign-born, uniformed airport police officer, and without identifying themselves disarmed the officer and placed him against the wall. The officer's partner obtained LEO assistance and arrested the agents.

- a federal agent was observed handing his ID to an unknown, unescorted, non-badged person who used it to enter the AOA in the agent's personal vehicle.

- repeated instances of armed officers contradicting airport security plans by clearing their armed status only through a security screener rather than the required airport LEO, and also refusing to display ID. This places an unbadged, <u>armed</u> person on the AOA, subject to challenge in an environment already made hostile by the continuing conflict between the agency and airport employees.

o After being denied access, federal agent threatened to arrest the guard, stating that "(Agency) owns the checkpoint, and can go anywhere we want".

o Pan Am management was threatened with arrest if they did not leave agency office when trying to resolve conflict with unbadged officers found on a jetway and properly challenged by carrier employees.

o Although agents at one airport have now "accepted" airport ID cards, they refuse to wear them, and refuse to pay for them. A previously "satisfactory" relationship has deterioriated since a recent personnel change.

o Same officer repeatedly challenges system by going through magnetometer without ID at checkpoint fully armed, refusing to sign the armed LEO log.
o refusal by an FAA regional office to support an airport's insistence that Customs agents adhere to FAR 107 badging requirements "until an agreement is reached between the FAA Administrator and the Director of U.S. Customs."

o 3 (agency) officers, without airport ID, seeking access onto the AOA, confronted 69 year old uniformed guard. All three threatened guard; one reached through guard-booth window, pulled off guard's badge and ripped his clothes, while another, reaching for his weapon, told guard he "is in serious trouble" for interfering with federal officers.

o Federal officer, seeking vehicle access without airport ID, was asked to pull over to wait for proper escort. Agent refused, stating that (agency) officer "does not have to wait for anyone," immediately drove onto AOA. Challenged again at cargo hangar, would only show badge.

o One armed, one unarmed federal agents, twice threatened screener with arrest for insisting that both be screened. The armed agent finally cleared screening in appropriate manner, after intervention by supervisory personnel, while the unarmed agent continued to refuse, and was denied access.

There were numerous reports of federal officers who, while not always belligerent in their attitudes, were apparently led by their agencies to believe that their federal ID, or their LEO badge, superceded any locally issued ID. Many such ID cards have no photos and are unable to be worn externally, which not only forces a challenge from an airport employee, but makes it impossible to determine whether the card was issued to the holder.

Most airports indicated long-standing frustration that the federal agencies have refused to act to clarify the differences, and that the government appears to be content to leave the resolution of interagency disputes to individual airport sponsors. Several airports indicated that such incidents are "blatant, deliberate, and continual", and that local warnings or arrests go unheeded, simply raising the ante for the next confrontation.

* * * *

Chairman GIBBONS. Thank you, Mr. Gordon.
Mr. Ambrose.

STATEMENT OF MYLES J. AMBROSE, CUSTOMS COUNSEL, UNITED PARCEL SERVICE, ON BEHALF OF THE AIR COURIER CONFERENCE OF AMERICA

Mr. AMBROSE. Thank you very much, Mr. Chairman.

For the record, my name is Myles Ambrose, I am a partner in the firm of Ross & Hardies, and I am testifying here today in my capacity as Customs counsel for United Parcel Service on behalf of the Air Courier Conference of America.

I have the pleasure of having with me the manager of the UPS Customs House Brokerage Organization, Mr. Phil Hughes, on my left.

I also currently am serving, in addition to having had the pleasure of being Commissioner of Customs, on the Treasury's advisory committee on commercial operations and I am on the steering committee of the JIG.

So, I have been involved in all of the operations and a lot of the testimony that has been going on here for the last few days.

ACCA is a trade association, of course, representing the interest of all the couriers. I have attached a copy of the membership list to my testimony.

At the outset we would like to express ACCA's appreciation for the ongoing efforts of the Customs Service and its personnel in working with this industry to accommodate the numerous changes and developments in this new area.

It is always difficult for any governmental organization to work in a new mode of transportation or a new mode of business development and I must say that the work that Customs has done with us over the past 5 years has been exemplary.

That is not to say, of course, that we do not have some problems on occasion.

We are particularly pleased, of course, with the assistance and the attitude displayed by the new Commissioner, Carol Hallett, and her senior staff, including Deputy Commissioner Mike Lane and Assistant Commissioner Sam Banks and Chuck Winwood.

Now, as you know, this is a relatively new industry and I am just going to try and highlight a few of the points that we thought would be important for you to have today.

The express carrier industry has developed or evolved over the past two decades in response to the needs of international commerce for expedited, integrated door-to-door delivery of documents and small packages.

The association's members specialize in high-volume, low value shipments and are currently responsible for up to 10,000 Customs entries per day and as many as 3 million per year.

In order to handle this work load, we have developed state of the art international import and export technology and we have done it and formulated our programs in conjunction with the needs of the Customs Service.

It is important for this committee to understand that the international postal services are the industry's primary competitors and

that express carriers are currently placed at a serious and unjustified competitive disadvantage vis-a-vis the U.S. Postal Service, due in part to Customs inadequate enforcement of its own regulations.

Specifically, Customs is required to collect a $5 processing fee on each dutiable mail entry for which it prepares documentation.

A 1986 study by Peat Marwick & Mitchell showed that in 98 percent of dutiable mail shipments valued at $225 or less neither the duty nor the processing fee was collected. Duty and fees, however, are collected on all shipments carried by the express carriers.

Of course, this creates an improper incentive for shippers to use the mail and ultimately involves a loss of duty and fees and increase cost to the tax payers.

We do not seek any special treatment. I want to make sure that is clear. We just want to be on the same playing field that the postal service is and whatever applies to our processing of packages should apply to the post office and vice versa.

I might add though that there has been an increasing awareness lately on the part of the Customs Service of this disparity and we are hopeful that there will be some resolution of this along the line.

We have examined, with some care, the Oversight Subcommittee's report on commercial operations. We have participated in furnishing some information to during the course of their investigation, particularly to Mr. Arnold and we, of course, concur in a number of their positions. I will just mention one that has been mentioned over and over again and I will not attempt over kill, but the over emphasis on enforcement has had a serious impact on the commercial operations of the Customs Service.

We also believe that many of the Customs Service decisions were made without adequate supporting data or analysis and we hope that this is being remedied. And, of course, the Customs automated commercial system is and probably continues to be flawed.

While the ACS concept is beneficial, its application and impact has not proved to have significantly improved clearance problems or arrived solutions yet. Customs automation procedures have not often kept pace with those of the industry.

One other major problem that we have is that Customs has frequently not taken into full account the actual business practices of the industry in the development of the ACS programs and they have sought enormous amounts of information without considering what the cost and the burden would be on the industry to supply it.

And I am not even sure that there has been serious analysis of the necessity for all this information. I think that is the area that we have got to work more closely with Customs on.

On the commercial—on the automated commercial system, we believe, of course, that the paperless entry that we have heard so much about is basically a misnomer and is not yet been of real benefit to the industry.

We are concerned that Customs is currently requiring or considering requiring even further information such as the submission of consignee taxpayer identification numbers on the informal shipments.

This information is not routinely available to us, as most express carrier deliveries are shipper-initiated and are destined to one-time or first-time consignees.

Obtaining this information would be enormously costly and would prevent ACCA's members from meeting their delivery commitments to customers. If this is not applied to the Postal Service there has been no contemplation for it to be applied to the Postal Service that we know of, it would add to the disincentive to use our services.

As far as the Customs Modernization Act, the association has not taken a full position on it yet, although I think it is fair to say that we would concur generally with the JIG proposals.

We do believe that the Modernization Acts, however, should include some other items.

Customs is a law enforcement agency. All law enforcement agencies work on a 24 hour basis. We believe that a provision should be included in this law to require Customs to operate on a 24-hour basis where necessary to meet commercial needs and commercial demands.

The world transportation and importing and exporting system is changing so radically that I do not think that Commerce should be required to adjust its operations to serve the needs of employees of the Customs Service.

Based on the limited information available, ACCA believes that the Customs proposal to change to a risk related entry approach may not accommodate and may actually impede the industry's business procedures.

We are much more inclined to believe that the value limit for low value entries, which are passed free of duty and fees, should be increased from the present $5 to at least $100 and preferably to $250 and that the value limit for informal entries be increased from its present $1,250 to at least $2,500.

Now, one of the most important areas that everyone has touched on in one or the other is the Customs staffing problem.

ACCA's members currently pay directly for additional staffing at their facilities either through the reimburseable statutes, overtime statutes, the small airport statute or user fees and we frequently pay, in effect, twice for these services.

We anticipate volume increases in our business of 100 percent per year and will obviously require considerable additional Customs personnel in order to handle this.

As it stands now, Customs will likely be unable to provide them due to budgetary and manpower ceilings. Staffing is a severe problem and we believe that the root of this problem lies not with Customs but with the current Office of Management and Budget staffing ceilings.

The express industry is fully supportive of reimbursing Customs for dedicated inspectors overtime and the provision of any other services that would allow the companies to continue to provide expedited clearance in a regulatory effective manner.

In order to make additional staffing available to Customs, however, we believe that the legislative proposal should include a mechanism to eliminate any OMB restrictions on personnel ceilings, both for reimbursable and overtime positions.

There would be no additional costs to the taxpayer or the Government.

We also believe, with the union and Customs, that the current $25,000 salary cap on overtime positions must be increased to at least $35,000 and that user fees must be directly allocated without appropriation to the Customs Service for commercial purposes as they are currently for the Immigration and Naturalization Service.

Now, of course, one other point that was made by the committee that we agree with is that there still are discrepancies in regulatory administration between ports and districts but we have a great feeling that this is leveling out and that I think the service is doing a reasonably good job in this area.

In closing, ACCA wishes to thank the Trade Subcommittee, the Oversight Subcommittee, and their respective staffs for their thorough review and analysis of the commercial operations of the service.

We are sure that these efforts will contribute to the effective development of Customs procedures which will promote the growth of international trade well into the 21st century.

Congress and the Customs Service can be assured of this industry's continued willingness to participate in and assist with this progress.

Thank you very much, Mr. Chairman.

[The statement of Mr. Ambrose follows:]

HEARINGS ON THE

COMMERCIAL AND TRADE OPERATIONS

OF THE

U.S. CUSTOMS SERVICE

* * * * * *

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON TRADE

MAY 2-3, 1990

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Testimony of Myles J. Ambrose

On Behalf of

The Air Courier Conference of America

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Mr. Chairman, my name is Myles J. Ambrose. I am testifying today on behalf of the Air Courier Conference of America ("ACCA" or the "Association"), in my capacity as Customs counsel for United Parcel Service, which is a member of the Association. By way of background, I served as the Commissioner of Customs from 1969 through 1972, and am currently a member of the Treasury Advisory Committee on Customs Commercial Operations. In addition, I am a member of the Steering Committee of the Joint Industry Group.

ACCA is a trade organization representing the interests of the international integrated express carrier industry. (A copy of the Association's membership list is attached.) On behalf of ACCA I wish to thank you for this opportunity to present the Association's views with respect to the commercial operations of the Customs Service, including in particular the Subcommittee on Oversight's recent report of its investigation into Custom's commercial operations and the Customs Modernization Act.

At the outset, I would like to express ACCA's appreciation for the ongoing efforts of the Customs Service and its personnel in working with the industry to accommodate the numerous changes and developments in business procedures that have been and continue to be necessary in order for express carriers to continue to meet the needs of the international business community. We are particularly pleased with the assistance and attitude displayed by the new Commissioner, Carol Hallett, and her senior staff, including Deputy Commissioner Michael Lane and Assistant Commissioners Sam Banks and Chuck Winwood.

I. The International Express Carrier Industry.

Express carriers comprise a relatively new and rapidly expanding industry, which has evolved during the past two decades in response to the needs of international commerce for expedited, integrated, door-to-door delivery of documents and small packages worldwide. This industry represents a significant force in the

international commercial arena. The Association's members specialize in high volume, low value shipments, and are currently responsible for up to 10,000 customs entries per day, and as many as 3 million entries per year. The industry expects shipment volumes to increase significantly over the next several years, with increases of up to 100% a year projected for some member companies.

In order to provide this high level and quality of service, the industry has, as a whole, developed and implemented state-of-the-art international import and export technology. This technology, and the industry's business practices, have been carefully formulated in conjunction with the Customs Service in order to enhance and facilitate both business and regulatory performance. The industry takes great pride in these joint efforts with the Service and believes that the results are proof positive that it is possible for regulatory agencies and the regulated industries to work together and to achieve mutually beneficial results.

It is important that the Subcommittee understand that the international postal services are the industry's primary competitors, and that express carriers are currently placed at a serious and unjustified competitive disadvantage vis-a-vis the U.S. Postal Service, due in large part to Customs' inadequate enforcement of its own regulations. Specifically, Customs is required to collect a $5 processing fee on each dutiable mail entry for which it prepares documentation. A 1986 study by Peat Marwick Mitchell & Co. showed that on 98% of dutiable mail shipments valued at $225 or less, neither the duty nor the processing fee was collected. Duty and fees are, however, collected on all shipments carried by express carriers. This creates an improper incentive for shippers to use the mail, rather than a commercial service, in order to avoid duty and fees, and ultimately results in higher costs to the taxpaper and a significant loss of revenue for the Customs Service.

We do not seek any special treatment, but do wish to be accorded treatment comparable to that accorded the Postal Service. We have been advised that Customs is now taking steps to correct this problem, by more actively enforcing its regulation of mail entries. However, ACCA believes that the problem remains far from resolved and that efforts to collect duty and fees are not yet yielding satisfactory results. For example, ACCA understands that the preliminary results of a recent Customs test of duty collection on mail entries at Dulles Airport showed that of 1,000 duty bills sent out, less than 400 duty payments were received.

Our industry is committed to working with Customs to assure that their mission is accomplished and that our deliveries are timely made. Due to the highly integrated nature of the service the industry provides, we have been able to provide the Customs Service with a high degree of information integrity, reliability, and advance notice which is necessary in order for the Service to maintain its compliance and enforcement standards. We do not believe that regulatory compliance should take undue precedence over business development. It is our hope that, under Commissioner Hallett's guidance, the Customs Service will place a renewed emphasis on a balanced and enlightened regulatory and enforcement program.

The industry believes that the Customs Service is at a critical juncture with respect to the consideration and implementation of various new legislative and regulatory proposals, many of which have the potential, depending on the manner in which they are developed, to either enhance, or impede, our growth. As a result, we feel that it is very important that we bring to the attention of the Subcommittee on Trade, as we have done with the Customs Service, our concerns with respect to these issues.

II. Subcommittee On Oversight Report On Customs' Commercial Operations.

Since its inception, the express carrier industry has worked closely with the Customs Service to develop business procedures which are compatible with the Service's regulatory requirements. The industry's relationship with the Service over the years has, as a whole, been a highly successful and mutually beneficial one. Service personnel have made themselves available to work with the industry for both planning and problem solving.

In addition, ACCA believes that Commissioner Hallett's tenure has already brought significant improvement to the Service. In particular, the designation of a Customs express carrier "liaison" and the establishment of a trade community ombudsman will do much to expand cooperation and communication between the industry and the Service. In addition, Commissioner Hallett and her senior staff members have made themselves available for meetings with representatives of the industry for discussion on a variety of topics.

Despite the generally positive and productive nature of the industry's relationship with Customs, ACCA does wish to note agreement with certain of the findings of the Subcommittee on Oversight.

1. In prior years, the emphasis on enforcement, while obviously important, was made at the expense of commercial operations. ACCA wholeheartedly supports the narcotics enforcement efforts of the Service, and we have and will continue to work with them in their efforts in this area. However, we believe that there has been a preoccupation with enforcement, and that Commissioner Hallett will bring balance back to this process.

2. We believe that in the past many Customs Service decisions were made without adequate supporting data or analysis. We concur with the Oversight Report's statement the Customs should "maximize the flow of information to the trade community prior to implementing new policies or procedures." For example, Customs lacked adequate statistics and financial accounting records for use in developing the recent user fee schedules. Due to this, Customs was unable to make data available to the industry or develop supportable fee schedules that would meet the requirements of the GATT decision.

3. We believe that the Customs automated commercial system ("ACS") is flawed. While ACS in concept is beneficial, in application and impact it has proved to have significant problems, as Customs own automation procedures have often not kept pace with those of the industry. In addition, Customs has not taken into full account the actual business practices of the industry in the development and implementation of ACS programs.

III. Customs Automated Commercial System.

A significant aspect of Customs' automation process is the trend for Customs to continually require more information, and to transfer to the importing community the burden of providing this information, often without first assessing the actual

necessity for such information, or the impact of compliance on commerce. A number of serious, or potentially serious, problems have resulted.

1. "Paperless entry" is a misnomer, and has yet to be of real benefit to the industry. Currently, even if an express carrier makes use of paperless entry procedures, Customs still requires hard copy in part of the process. For example, if an entry is filed electronically, the entry summary must be hard copy, or vice-versa. We question the efficiency of such a process.

2. Customs is currently considering requiring the submission of consignee taxpayer identification numbers on informal shipments. This information is not routinely available or on file, as most express carrier deliveries are shipper-initiated and are destined to one-time or first-time consignees. Obtaining this information would be enormously costly and would prevent ACCA's member from meeting their delivery commitments to customers, which usually call for next day or second day service. In addition, unless the Postal Service were required to also provide this information, the incentive for customers to use the mail in order to avoid Customs regulations would be increased.

   ACCA understands that statistical reporting data on informals may also be required. For similar reasons, this information could not be provided without significant expense and shipment delays. Serious analysis and justification for the need for such additional information must be made by Customs before imposing this burden.

3. Customs is currently using ACS in order to monitor merchandise regulated by other agencies such as the FDA and Fish & Wildlife. Customs has apparently programmed incorrect merchandise tariff codes into ACS, which is resulting in unregulated merchandise being held for, and regulated merchandise avoiding, authorization by other agencies. For example, one ACCA member recently received ACS notification that a shipment of jewelry required an FDA release!

IV. <u>The Customs Modernization Act</u>.

ACCA supports Customs efforts to modernize its legislative framework. However, we are not certain that the Customs Modernization Act appropriately addresses all of the issues facing importers. We also note that no information, other than a brief summary of the Act, has yet been made available to the trade community. We have some concerns that importers may not be provided a full or adequate opportunity to review the Act and to communicate with Customs and the Treasury prior to its introduction in Congress.

We believe that the Modernization Act should include the following:

1. A provision to require Customs to operate on a 24-hour a day basis where necessary to meet commercial demands. International business in general, and the express carrier industry in

particular, operate around the clock. The agencies which regulate this industry must be prepared to do so as well. International commerce should not be forced to operate on a 9-5 basis in order to fit the needs of the current arbitrary governmental framework. Essential government services, such as Customs commercial operations, should be available where and when needed, without cumbersome and expensive special arrangements.

2. Based on the limited information available, ACCA believes that Customs' proposal to change to a risk-related entry approach may not accommodate, and may actually impede, the industry's business procedures. Our extensive importing experience leads us to recommend that, rather than a risk-related entry approach, Congress authorize that:

- the value limit for low value entries, which are passed free of duty and fees, be increased from its current $5 to at least $100, and preferably $250.

- the value limit for informal entries be increased from its present $1,250 to at least $2,500.

These changes would be beneficial for both Customs and the industry. We believe that these changes would allow Customs to free staff from undue processing requirements on low value, low risk entries, and to allocate more staff time to higher priority work loads.

V. Customs Staffing Problems.

ACCA's members currently pay directly for additional staffing at their facilities, either through Title V of the Independent Offices Appropriation Act of 1952 ("Reimbursable Services Statute", 31 U.S.C. §9701) or Section 236 of the Trade and Tariff Act of 1984 ("Small Airport Statute", 19 U.S.C. §58b), as well as indirectly through the user fee statute (19 U.S.C. §58c(a)). As noted previously, ACCA's members anticipate volume increases of up to 100% per year over the next several years, and will require the services of additional Customs personnel in order to process these shipments in accordance with service commitments to customers. It is our understanding, however, that despite these needs and the willingness and ability of the industry to pay for additional positions, Customs will likely be unable to provide them due to budgetary and manpower ceilings.

Staffing shortages in ports and district offices are already resulting in extreme delays in the issuance and processing of routine penalty cases and other administrative matters. For example, some ACCA members have experienced delays of up to a year in the issuance of penalty notices, and delays of many months in the issuance of petition responses. Inadequate staffing has also caused delays in the issuance of decisions on seizure cases and in refunds of amounts paid to Customs for early release of merchandise.[1/]

1/ Given the exceptionally high volume of customs entries made by the industry, we believe that the statistical percentage of penalty and other problem matters is exceedingly low and reflects an over-all excellent importing record. Most penalty cases against express carriers consist of relatively minor matters, which are resolved with minimum fines being assessed. The initial penalty amount unusally reflects a disproportionately high figure, and the fact that these amounts remain outstanding for long periods of time reflects
(Footnote Continued)

The Cleveland district (where several ACCA members have operations) exemplifies these problems. Cleveland Customs personnel have done, and continue to do, a superb job under difficult conditions, and have at all times made every effort to cope with the workload and make themselves available to assist importers. However, due to the exceptionally high workload and staffing shortages in that office, long delays are the norm. ACCA believes that everything possible must be done to provide Customs personnel, not only in Cleveland but around the country, with the additional support they need and deserve.

Clearly, staffing is a severe problem not only for importers, whose business suffers, but for Customs Service personnel, whose morale and subsequent performance also suffers. ACCA believes that the root of this problem lies not with Customs, but with the current Office of Management and Budget ("OMB") staffing ceilings.

The express industry is fully supportive of reimbursing Customs for dedicated inspectors, overtime, and the provision of any other services that would allow the Service to continue to provide expedited clearance in a regulatory effective manner.

In order to make additional staffing available to Customs and importers, ACCA recommends that:

1. The current Customs legislative proposals should include a mechanism to eliminate any OMB restrictions on personnel ceilings, both for reimbursable and overtime positions. There would be no additional cost to the government or the taxpayer, as these positions are paid directly by importers, such as ACCA's members, who need them. Directly reimbursed positions should not be subject to restrictive personnel ceilings. These ceilings are arbitrary and impact adversely on the growth of this industry and Customs' ability to fulfill its mission.

2. The current $25,000 salary cap on overtime positions must be increased to at least $35,000.

3. User fees must be directly allocated, without appropriation, to the Customs Service for commercial purposes (as they are for the Immigration and Naturalization Service).

VI. Discrepancies in Regulatory Administration Between Ports and Districts.

ACCA believes that the Service has made significant progress towards resolving the issue of regulatory and administrative discrepancies between different Customs offices, and towards establishing reliable, uniform and consistent administrative procedures. However, ACCA's members, who operate in multiple Customs districts and ports and whose business operations require national regulatory consistency, continue to experience problems of this sort which make day-to-day business operations unnecessarily difficult. For example:

1. While the statutory maximum for low value entries which can pass free of duty and fees is currently set at $5, various ports are, in practice, using higher maximums or different standards altogether. For example, Association members have reported that a Northwest

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adversely on the credit standing and customer and surety relations of ACCA's members, as well as their relationship with the Customs Service.

port has permitted entries valued up to $25 to pass free of duty, and that a Southeastern port has not required an entry to be filed on shipments where duty of $5 or less was due.

ACCA believes that this is further evidence that an increase, by statutory amendment, of the low value entry limit would be practical for both Customs and importers and would further harmonize the regulatory process.

2. Customs in Hawaii currently wants informal entries to be filed through the Automated Broker Interface ("ABI"), even though Customs Headquarters has not yet instituted this requirement.

3. A major Midwestern District currently requires that sample shipments of restricted textile products be filed by "live" (formal) entries, even though Customs Headquarters directives permit them to be cleared as informal entries.

4. In general, Customs often issues directives or administrative memorandums on issues which have the potential for a serious impact on the industry's business operations, but which may not allow sufficient time for comment or compliance. This information may also not uniformly be distributed to importers, and may be interpreted and applied differently by different Customs officers. Recent examples of this include notices of new requirements for house airwaybill digit numbers, manifest information, and the ABI processing of informal entries.

* * *

In closing, ACCA wishes to thank the Trade Subcommittee, the Oversight Subcommittee, and their respective staffs for their thorough review and analysis of the commercial operations of the Customs Service. We are sure that these efforts will contribute to the effective development of Customs procedures which will promote the growth of international trade well into the twenty-first century. Congress and the Customs Service can be assured of this industry's continued willingness to participate in and assist with this process.

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Chairman GIBBONS. Mr. Bernstein.

STATEMENT OF DAVID H. BERNSTEIN, PRESIDENT, INTERNATIONAL ASSOCIATION OF AIRPORT DUTY FREE STORES, AND CHAIRMAN OF THE BOARD, DUTY FREE INTERNATIONAL

Mr. BERNSTEIN. Mr. Chairman, the International Association of Airport Duty Free Stores is pleased to have this opportunity to testify before you today.

I am David Bernstein, president of the association and chairman of the board of Duty Free International in Glen Burnie, MD.

I have an extended statement that I would like to have printed in the record.

Chairman GIBBONS. All statements will be printed.

Mr. BERNSTEIN. Your hearings on prospective customs legislation are timely. In the 12 years since the last comprehensive review, much has changed at Customs and much has changed in our industry.

Your committee was instrumental in establishing legal recognition and permanence to duty free in 1988 with passage of your omnibus legislation. That law established a framework from which the Customs Service and our industry can operate.

The duty free industry is heavily regulated by Customs, but has the reputation in the Government of being responsive, cooperative, and highly reputable.

Passage of the duty free enterprises bill was a result of a common belief by Customs and the industry that mutual ground rules could be jointly established to the satisfaction of both parties.

Mr. Gibbons, your subcommittee ratified that agreement and for that we are extremely grateful.

Customs has proposed numerous changes to the law that are of interest to our industry. I will talk about three today.

We are particularly interested in an increase in the duty free allowance for returning U.S. residents. While it is presently $400, Customs seeks an increase to $1,000. There is also a proposed and accompanying increase of the allowance available to those returning from U.S. protectorates, $2,000 up from $800.

IAADFS strongly supports these proposals. The duty free allowance is an incident of international travel and recognizes the bona fide traveler who is absent from the United States on vacation or business.

The volume of merchandise and amount of duty collected is low compared to commercial merchandise entering our country. It is highly inefficient for the Customs Service to apply scarce resources to the time-consuming, low-value duty collections that are common to noncommercial traffic. It is far more productive to establish levels that will yield greater returns and permit Customs to apply more personnel to the commercial trade. It will reduce the long lines and other inconveniences of international travel.

There is, however, an additional feature of the increase that we believe would be beneficial to the U.S. industry, removal of the requirement that the allowance may only apply to incoming residents who have purchased the goods abroad.

To our knowledge we are the only country which has such a law. We believe that the allowance should also apply to goods which are purchased by U.S. citizens in U.S. stores and which are subsequently taken abroad and then returned to the United States at the end of the trip.

If there is to be a $1,000 allowance for a traveler's purchases, does it not make sense to extend that benefit to the U.S. industry and not overseas stores alone?

This change will stimulate sales in the United States and it will free Customs of another time-consuming responsibility, the task of trying to decipher where duty-free goods have been purchased.

It is an unnecessary burden on Customs and the international traveler to engage in policing and documenting purchases which, if purchased abroad are okay, but if purchased at a U.S. store are not covered by the allowance.

Finally, we request an increase in the allowance for bona fide gifts sent from persons in foreign countries to persons in the United States. Presently, the law limits the gifts to the aggregate fair retail value of $50 per recipient per day, including the cost of shipping. It may not include alcohol, tobacco, or perfume containing alcohol.

Again, the industry believes that Customs time can be better spent on high-value, high-volume transactions. An increase to $125 would be proportionate to increases provided elsewhere on the Customs proposals and make good sense to our industry.

Mr. Chairman, the International Association of Airport Duty-Free Stores is pleased to have had their first opportunity to appear before this subcommittee. Your interest in our industry has been very helpful over the years, particularly during passage of what to us was landmark duty-free legislation.

We intend to work with the committee closely in the months ahead and know that you welcome this participation.

And, finally, I would just like to add to what most of the other speakers have expressed about the new attitude in Customs and Commissioner Hallett and the staff. We too have found a whole new attitude, one of willingness to work with our trade for the betterment of both concerned. We are very pleased with that new relationship.

Thank you.

[The statement of Mr. Bernstein follows:]

TESTIMONY OF DAVID H. BERNSTEIN, PRESIDENT
INTERNATIONAL ASSOCIATION OF AIRPORT DUTY FREE STORES

Mr. Chairman, the International Association of Airport Duty Free Stores (IAADFS) is pleased to have this opportunity to testify before you today. I am David Bernstein, President of the Association and Chairman of the Board of Duty Free International, Inc., Glen Burnie, Maryland. Your hearings on prospective Customs legislation are timely. In the twelve years since the last comprehensive review, much has changed at Customs and much has changed in our industry. Your committee was instrumental in establishing legal recognition and permanence to duty free in 1988 with passage of your omnibus legislation. That law established a framework from which the Customs Service and our industry can operate. The duty free industry is heavily regulated by Customs, but has the reputation in the government of being responsive, cooperative and highly reputable. Passage of the duty free enterprises bill was the result of a common belief by Customs and the industry that mutual ground rules could be jointly established to the satisfaction of both parties. Mr. Gibbons, your subcommittee ratified that agreement and, for that, we are extremely grateful.

Customs is presently promulgating regulations to implement the duty free enterprises law. Like passage of our bill, this too has been marked with extensive industry input and a strong predisposition by Customs to accommodate our legitimate interests. While we have yet to see a proposed rulemaking, it is anticipated that there will be little that would prompt us to turn to Congress for clarification or change. We will therefore forego comment on matters now under consideration and are hopeful that the results will be mutually acceptable.

Customs has however proposed numerous changes to the law that are of interest to our industry, particularly an increase in the duty free allowance for returning U.S. residents. While it is presently $400, Customs seeks an increase to $1000. There is also proposed an accompanying increase of the allowance applied to those returning from US protectorates -- $2000, up from $800. IAADFS strongly supports these proposals. The duty free allowance is an incident of international travel and recognizes the bona fide traveller who is absent from the U.S. on vacation or business. The volume of merchandise and amount of duty collected is low compared to commercial merchandise entering our country. It is highly inefficient for the Customs Service to apply scarce resources to the time-consuming, low-value duty collections that are common to non-commercial traffic. It is far more productive to establish levels that will yield greater returns and permit Customs to apply more personnel to the commercial trade. And, it will reduce the long lines and other inconveniences of international travel.

There is however an additional feature of the increase that we believe would be beneficial to the U.S. industry -- removal of the requirement that the allowance may only apply to incoming residents who have purchased the goods abroad. To our knowledge, we are the only country which has such a law. We believe that the allowance should also apply to goods which are purchased by U.S. citizens in U.S. stores, and which are subsequently taken abroad and then returned to the United States at the end of the trip. If there is to be a $1000 allowance for a traveller's purchases, doesn't it make sense to extend that benefit to the U.S. industry, and not overseas stores alone? This change will stimulate sales in the U.S. and it will free Customs of another time consuming responsibility, the task of trying to decipher where duty free goods have been purchased. It is an unnecessary burden on Customs and the international traveller to engage in policing and documenting purchases which, if purchased abroad, are ok; but, if purchased at a U.S. store, are not covered by the allowance.

Finally, IAADFS requests an increase in the allowance for bona fide gifts sent from persons in foreign countries to persons in the U.S. Presently, 19 U.S.C. 1321(a)(2)(A) limits gifts to the aggregate fair retail value of $50 per recipient per day (including the cost of shipping). It may not include alcohol, tobacco or perfume containing alcohol. Again, the industry believes that Customs time can be better spent on high-value, high-volume transactions. An increase to $125 would be proportionate to increases provided elsewhere in the Customs proposals and make good sense to our industry.

Mr. Chairman, the International Association of Airport Duty Free Stores is pleased to have had their first opportunity to appear before the subcommittee. Your interest in our industry has been very helpful over the years, particularly during passage of what to us was landmark duty free legislation. We intend to work with the Committee closely in the months ahead and know that you welcome this participation.

Chairman GIBBONS. Thank you, Mr. Bernstein.

We hear very clearly what you are telling us and we will take all of that into consideration and see if we can work out the conflicts that are constantly arising and put it into operation as soon as possible.

Mr. Landry, I am particular interested in the preclearance for foreign travel. I think it produces a lot safer airline and since most airlines themselves now are requiring early arrival at the airport for their passengers and early check-ins and things of that sort, I think it just makes good sense to do it in preclearance.

I realize it is a little more expensive, I also realize that you have to get the cooperation of the foreign country, and I realize sometimes the configuration of the airport makes it difficult, but those are all things that we can work out.

What is the position of your industry on all of this?

Mr. LANDRY. We are in total agreement with you, Mr. Chairman. It has tremendous facilitative benefits, particularly when you select a hub overseas from which a number of spokes emanate to various gateways here in the United States. It is such more—so much more facilitative to have the aircraft trickle loaded at that hub overseas and go through the inspection process, as opposed to disgorging en masse planeloads of passengers at ports of arrival here in the United States.

And with the proliferation of ports of arrival here in the United States, it makes even more sense.

And you have also touched on one other very important byproduct of this—a fringe benefit, if you will, of great importance in the era that we are living in and that is, it increases security. It enhances the security of our operations.

It is somewhat intimidating, I would suggest to you, even to a terrorist, to have to face a Federal U.S. Government inspector in uniform before boarding an aircraft and we think that obviously that security benefit, as well as the fact that you keep out illegal aliens, you keep out diseases that are troublesome, you keep them over on the other side of the water so to speak, rather than permitting them to come here.

So, again, we applaud any expansion of preclearance.

Chairman GIBBONS. Well, have you all, as an industry, worked on foreign governments on this, too? We need their cooperation as much as we need the U.S. Government's cooperation.

Mr. LANDRY. We have, but, Mr. Chairman, we have sort of a halfway house at this point in time in that the Customs Service for the last several years has been somewhat reluctant, frankly, to expand total preclearance.

But the Immigration and Naturalization Service has been very enthusiastic about it and so we have been placing abroad, in a number of locations, what is called preinspection. That is just the inspection for Immigration and Naturalization Service purposes.

We will have this—for example, in a test period, an experiment, for some 3 or 4 months at London's two major airports this fall, in which the formalities for INS purposes will be performed at those two airports.

And you will have immediately, then, the information that you glean from the passports as the people—as the passengers pass through that INS inspection.

That information will immediately have access to all of the Federal inspection intelligence agency look-out information, and we can keep out a lot of undesirable people that way because the inspection will be in London, not here.

Chairman GIBBONS. Well, why have the Customs people been so reluctant to implement this?

Mr. LANDRY. Well, I, frankly, Mr. Chairman, I believe it is the traditional notches-in-the-rifle syndrome that unfortunately is pervasive in most intelligence agencies or law enforcement agencies.

They do not, in several countries abroad, have the powers to arrest and seize and so you do not get that credit or that notch in your rifle for a seizure. And, I think, as I believe it was Mr. Gordon suggested, that we need increased cooperation with the law enforcement agencies of those foreign countries to make sure that the people are apprehended on that soil and properly dealt with by their justice system, but also kept out of this country.

Chairman GIBBONS. Well, does the International Association, which I imagine you also belong to, does it feel the same way about this that you do?

Mr. LANDRY. You mean the International Air Transport Association?

Chairman GIBBONS. Yes.

Mr. LANDRY. It is extremely supportive of preinspection. It has traditionally been a little bit less aggressive on full preclearance, in other words Customs clearance as well.

And the reason is that there are—if you do not properly select the hub at which you would put in a full preclearance operation, both Immigration and Customs, you could be in a situation where you have through flights, for example, coming through that airport and you would have to to meet the requirements of the customs law, if you have not inspected the baggage and the passengers at the prior port, you would have to unload all of those—all of that baggage and so forth.

What is particularly appropriate for preclearance is an originating flight at a hub. And, as I said, for example, at a place like London today, you can have originating flights from London to some 20 gateways here in the United States. It makes great good sense to put the staffs there rather than at the 20 airports here.

Chairman GIBBONS. Mr. Ambrose, do you have any experience with this?

Mr. AMBROSE. I was afraid you were going to ask me that. Mr. Landry and I had many a fight over this very subject some years ago, about 18 years ago now.

Chairman GIBBONS. Why can you not agree with Mr. Landry?

Mr. AMBROSE. Frankly, the problem with preclearance, aside from where the originating flights are, from the Customs standpoint has always been the host country's attitude towards enforcement.

I could specifically name, if you wanted me to, I do not think I ought to do it publicly, some countries in which we would be crazy to allow preclearance to come in because the corruption problems

over there are so great that we would have an open doorway for illegal shipments of a variety of types that come in to the United States.

So I think the general concept of preclearance has worked well, it is very expensive, but I think, for example, the Canadian operation is working very well. The immigration situation, of course, is designed primarily to stop illegal aliens from coming in, particularly from England and Ireland, where they operate from more than any place else.

I do not know why they do not go to some other countries, but that is another issue.

Mr. LANDRY. Mr. Chairman, if I could add just one point to what Mr. Ambrose just said. The Government Accounting Office did some studies of preclearance for the Immigration and Naturalization Service and concluded that it was eight times as cost effective as putting INS staffs at all the ends of the spokes.

In other words, put them at a hub, it is eight times as cost effective as putting them out at the spokes.

Mr. AMBROSE. I think that is very true, but it is a different situation. I mean, they are keeping people from getting on airplanes that should not be getting on them in the first place. It is a little different than doing the Customs inspection.

Chairman GIBBONS. Well, you are keeping bags off an airplane that should not be on an airplane.

Mr. AMBROSE. Well, that is a little harder to do, you know, in assessing the duty and so forth and so on. It is a much more pervasive inspection.

The immigrations inspection is basically whether the person has accurate documents for getting into the United States and that is a fairly cursory inspection, Mr. Chairman.

Chairman GIBBONS. Does it take any longer to inspect a bag in a foreign country than it does in this country?

Mr. AMBROSE. Yes, it—I do not think it takes any longer to do it in a foreign country, I think it is just a question of whether it can be done properly in a foreign country.

Mr. LANDRY. If you can negotiate immunities with the foreign country so that you can make the seizures and so forth that is the optimum, but other than that, in those countries where you cannot get those powers for our U.S. forces—U.S. inspection agency, then the answer, it seems to us, very clearly is to make arrangements with the local law enforcement authority so that the people who are trying to break the law are not allowed to break the law on that soil and you keep the person and his baggage out of the United States.

Chairman GIBBONS. Well, let us take a real one. Heathrow and Gatwick, would we have trouble with the British getting——

Mr. LANDRY. No. We have negotiated with the British, in fact, the negotiations just took place a few weeks ago, for this preinspection experiment that will go on for 3 or 4 months this fall.

We had cooperation of the U.S. Embassy over there, the Ambassador. We have negotiated for that right. Now, preclearance, full preclearance, in other words, Customs inspection as well, was not proposed.

Chairman GIBBONS. Why?

Mr. LANDRY. Because as I said, the Customs Services has always been reluctant to spread preclearance. There have been times when they have considered it a possible avenue for the entry of drugs and so forth.

We think properly handled it is a much sounder enforcement mechanism than trying to do it here when you are faced with a plane load of passengers as opposed to the trickle loading of passengers at the point of origin.

Chairman GIBBONS. I found the British pretty respectful of the law and have good enforcement. Why cannot Customs go over there and do it?

Mr. LANDRY. Well, I think they could if they were to request it. Obviously this was a request made by the Immigration and Naturalization Service. The British ran a reciprocal experiment at Charlotte Airport and JFK Airport for the past two summers for short periods of time.

They found it useful, we know it is going to be extremely useful in the two major airports in London.

Chairman GIBBONS. Well, at those airports did they try doing the Customs Service there?

Mr. LANDRY. No, it was strictly an immigration arrangement that they had——

Chairman GIBBONS. Mr. Gordon, you seem to have something you want to say on this.

Mr. GORDON. Yes, sir, Mr. Chairman, if I may. Just to point out that I think there is some room for optimism in the establishment of Customs preclearance overseas. It is going to take a while.

In Canada we have had problems, because of Canadian laws, that are very similar to ours, and the Canadians take similarly dim views of narcotics and so forth. I do not think we would call them an undemocratic country.

They, however, have a much different law on currency transactions and currency movements and that is the major sticking point in Canada.

I think, though, that with the United Kingdom, for example, once the benefit of immigration preinspection is shown, I think we will see a movement in a number of places, in Europe, for example, to try to get that same privilege for foreign airports.

Although I am here representing just AOCI's U.S. members, a third of our membership consists of overseas airports and they have very mixed views on this.

On one hand they do not like the idea of having our lines exported to their airports. On the other hand, they do see that there is a considerable potential for commercial advantage.

When a passenger from London does not have to stand in an immigration line at Kennedy, he is more likely to want to fly through London.

There was a case, a very unfortunate case of a man who passed away in line at Kennedy in immigration. The poor man could not even see the inspectors when he died.

These delays can be avoided.

Chairman GIBBONS. Well, the fragility of an aircraft when it is in the air, I cannot see any reason, any reason on earth why they

cannot extend our safety through the Customs Service to that. It just seems like bureaucratic foolishness to me.

Mr. Frenzel.

Mr. FRENZEL. Thank you, Mr. Chairman.

I would like to ask Mr. Ambrose, you indicated that we should take certain limits off and there would be no cost to the tax payers or to the Government.

Can you explain that to me?

Mr. AMBROSE. Sure. Currently Customs is authorized to have approximately 17,000 employees. Even though we could pay for additional employees, just take UPS for example, at its hub in Kentucky, Customs would say, "Fine, we would love to put those additional employees on, but we are still limited to 17,000," whatever it is, "employees and OMB refuses or has refused thus far to allow those fully reimbursed positions to be an exception to that ceiling."

And we believe that there should be exceptions to that ceiling. A process could be developed where it would not—obviously it does not cost the taxpayer because we pay not only the salary but we pay the additional increments for fringe benefits and so forth and so on.

Mr. FRENZEL. Thank you very much.

Mr. Gordon, you indicated there should be a legislatively imposed minimum of 45 minutes on Customs inspection, that no one should have to wait more than that amount of time.

If we did that would it be fair for us to say no airplane should land more than 15 minutes late?

Mr. GORDON. I do not think so, sir. First of all, let me back up and say that I think there should be a legislative requirement for 45-minute clearance by all agencies, a 45-minute total clearance time for all the Federal inspection services.

I feel that it is appropriate for legislation by this subcommittee or this committee, because it is a matter of trade and tourism, but Customs Service can meet a 45-minute standard. Customs Service, working with the other foreign inspection agencies cannot at most airports.

So, I think that that is a problem.

The other part of it though, your question about the aircraft scheduling, the work load, it can be a problem when the traffic arrives in a particularly sharp peak when you get more than one 747 on the ramp at once. It could be a real problem.

But I think that with reasonable staffing, you can move a jumbo jet full of people or the load of people from the jumbo jet, through the inspection facility well within 45 minutes, and if you get two then they do have to stand in line for maybe 45 minutes.

If we do not have adequate staffing for normal processing then we certainly are not going to be able to do it.

Mr. FRENZEL. We have had a lot of trouble with flight scheduling and——

Mr. GORDON. I know that, sir.

Mr. FRENZEL [continuing]. We do have to work together, the carrier, the airport, and the Customs Service, and all of us, but I hope we would shoot for your target. I am not sure we would want to legislatively establish it but I think we would all want to encourage speedy movement through.

Can you tell us, Mr. Landry, what you expect in terms of increased international passenger travel in the next decade?

Mr. LANDRY. The next decade—as I indicated in my statement, we have had a 50-percent growth in the last 3 years. I believe that people are forecasting at least a doubling in the next 10 years, because while domestic traffic has flattened out and we are not experiencing the exciting growth we did in the first several years after deregulation in this country, international traffic growth is still booming and we hope it continues that way, we expect it to continue that way.

Mr. FRENZEL. Thank you very much.

The subcommittee is indebted to each of the witnesses and this panel has concluded its work. The next panel will be called, Mr. Gibbons will shortly return from this vote to begin the testimony of the next panel.

Thank you very much, gentlemen.

[Recess.]

Chairman GIBBONS. Well, our next panel consists of Mr. Eugene Stewart and Joseph Mayer.

Mr. Stewart, welcome, glad to see you again.

Mr. STEWART. Thank you.

Chairman GIBBONS. Mr. Mayer from the Copper & Brass Fabricators Council, glad to see you again, too.

Mr. MAYER. Good afternoon.

Chairman GIBBONS. Mr. Stewart, go right ahead.

STATEMENT OF EUGENE L. STEWART, ESQ., SENIOR PARTNER, STEWART & STEWART, WASHINGTON, DC

Mr. STEWART. Thank you. Mr. Chairman, I have previously submitted a comprehensive statement with a table of contents.

Chairman GIBBONS. Yes, sir, I saw that and it is up to your usual work.

Mr. STEWART. Thank you, sir.

Chairman GIBBONS. Well prepared.

Mr. STEWART. This morning I have placed before you a condensation of that statement on nine pages double-spaced. I am, however, not going to read that, Mr. Chairman, I am going to summarize that——

Chairman GIBBONS. Well, we will place both of them in the record, sir.

Mr. STEWART. Thank you, and I give you the highlights.

Out of my 39 years of practice in representing domestic industries in antidumping and countervailing duty cases I have learned bitterly that your committee's concern for the lack of accounting controls and the Customs Service collective process is justified and your concern expressed earlier today that antidumping and countervailing duties should be vigorously enforced and administered is a correct objective and that objective is not being carried out.

On the basis of the experience of the Timken Co., who has struggled for 16 years to secure relief from antidumping proceedings, I will summarize for you now very briefly, three major problems that need to be addressed by your committee.

The first problem is that Customs allows many entries of merchandise, which are subject to the payment of antidumping duties and countervailing duties, to be liquidated free of any assessment of such duties.

In Timken's case, this has happened on three occasions. On one occasion because the Customs Service, in an error of judgment, instructed people in the field to liquidate entries that had been suspended free of duty.

Subsequently, they corrected that error but it was too late because hundreds of entries had been liquidated and are no longer subject to the payment of dumping duties.

In the second occasion Customs had correctly instructed the field not to liquidate Customs entries, but in view of the earlier erroneous instructions, people in the field continued to follow the earlier erroneous instructions and their supervisors and management people failed to detect that wholesale liquidations of entries subject to dumping duties were taking place without the payment of duty.

The third type of error that results in this is when the Commerce Department was given the jurisdiction, formerly held by Treasury, to determine whether entries—merchandise were subject to dumping duties.

The Commerce Department, in an annual review of the tapered roller bearing finding of dumping, erroneously decided to terminate the finding of dumping with respect to the volume of imports from the largest Japanese manufacturer.

We went into the Court of International Trade and happily that Court determined that Commerce was in error and three times had to remand the case to the Commerce Department to correct errors in methodology and in arithmetic.

Only recently was a final determination made by Commerce that the entries they previously had determined were not subject to any duties are, in fact, subject to the payment of a duty of 38 percent in order to neutralize the amount of dumping.

This type of problem, which is a serious one and which recurs, needs to be corrected by an amendment that I have offered in my testimony to amend the law to require Customs to reliquidate entries that were erroneously liquidated without payment of antidumping duties, if that action is taken within 18 months of the date that the error of the erroneous liquidation is discovered.

The second type of error, which is a major one, the problem of denying domestic industries the relief to which they are entitled may be described as follows.

In the case of the tapered roller bearing antidumping finding, which was entered in 1976, there have been 16 years of entries subject to that finding of dumping which are subject to the eventual assessment and payment of dumping duties, but not one of the entries in that 16-year period of entries has yet been assessed with dumping duties.

Sixteen years during which the relief intended for the domestic industry by duties to neutralize the unfair competitive advantage of dumping has not, in fact, been administered.

That problem is a function first of the inability of the Customs Service and Treasury when they had the responsibility systemati-

cally to complete the evaluation of the amount of duties to be assessed and to proceed with the instructions to the field.

Commerce Department, in 1980, inherited 6 years worth of entries that were subject to dumping duties and they have had since that time, 9 additional years' worth, a total of 15 or 16 years.

Commerce has been hobbled by a number of problems during a long period. The Office of Management and Budget and the Secretary of Commerce, under the budget guidelines of the administrations in office, simply starved the International Trade Administration Office of Compliance with sufficient manpower at appropriate ratings to attract and hold people to do the job.

Nevertheless, until Commerce determines the amount of duties to be assessed and publishes that in a final determination, Customs ministerially cannot proceed to the collection of the proper amount of antidumping duties.

The remedy for that problem is twofold. First, it is essential, and your committee, as I have observed in today's hearings, is understandably and properly concerned that the Office of Management and Budget—and Budget, not so tightly discipline the funds available to these action agencies that they are unable to do their job.

And I have personally, as an attorney, sought to assist the International Trade Administration in securing appropriate budgets. The problem is at the management and policymaking level.

The officials of the Department are driven by the budget objectives of the President and the Office of Management and Budget and the size of the job to be done is not addressed meaningfully by appropriate budget allocations.

I do not wish my testimony to be understood as expressing any disrespect for the people in either Customs or Commerce, each of whom I believe are manfully endeavoring to do properly an awesome job of great complexity.

The third problem which is very serious is that it is not possible for Customs or Commerce or the domestic industry to know, at any particular time, whether the entries subject to the assessment of dumping duties are, in fact, being withheld from appraisement so they will eventually become subject to the payment of duties.

It is not possible to know if the proper amount of bonds or cash deposits are being required after a preliminary determination of dumping and subsidies but before a final determination.

It is not possible to know after a finding of injury and a final determination of dumping and subsidies whether the amount of estimated duties to be paid in cash is being collected in the right amount.

And after Commerce completes what is euphemistically called an annual review of the dumping orders to make its final assessment of duties, it is not possible to know if that correct amount of final duties is in fact being assessed and collected.

Commerce and Customs have attempted to create a set of reports flowing from Customs to Commerce which are totally inept, totally lacking in detail and meaning, and do not provide sufficient information so that Customs at the management level and Commerce at the management level can address this problem, follow it, monitor it, identify problems when they arise, and quickly resolve them.

To address these problems we have recommended to you in our prepared testimony two reforms. One is a requirement that when the consumption entry is filed by the importers, you would be required to place a symbol, "AD" for antidumping or "CVD" for countervailing duty in front—in the space where the entry number will be entered so that will be picked up on the computer.

Second, as is most recently been provided for in the Customs instructions that a reference to the case number, as assigned by Commerce to the antidumping and/or countervailing duty proceeding, be placed right below the harmonized tariff number that has to be entered on the entry.

And that in addition to the normal duty rate, the estimated duty rate for antidumping duties and countervailing duties be entered on the entry, that the entry clerk at the port be required to review entries and not accept them unless that information is placed on the entry.

Third, that the import specialist, when he undertakes to classify and appraise the merchandise, be required to place on his duty summary sheet that he generates, attaches to the entry, and sends to the liquidator, an identification of the entry subject to dumping and countervailing duties, the amount of estimated duties that was paid, and the final amount of dumping or countervailing duties plorable [sic].

When that goes to the liquidator at the port, the liquidator should be required to review and verify that information and to see that it is entered in the electronic data processing system into which the financial accountability of Customs at the port is determined.

Associated with that recommendation is that monthly the Director of Customs at each district be required to prepare from the data bank and the finance department at his port, a computerized report of all entries and tariff item numbers that are subject to antidumping duties that are pending at his port, the number that are suspended for liquidation, and the number that have been liquidated, and the appropriate details.

That should be forwarded to the Customs Service and the International Trade Administration in Washington. The ITA should then prepare a monthly summary and make it available under a confidentiality agreement to the domestic industry and interested parties.

Commerce and the interested parties should then monitor and review that monthly report to be on guard and vigilant about the status of the entries that should be subject to the collection of dumping duties.

One final recommendation.

Up until—it might be suspected that I was alive at the time and know this from experience but I studied. Up until the Customs Simplification Act of 1890, the collectors of Customs were personally accountable for the proper collection of Customs duties.

They were subject to an audit by the Customs auditor and if their accounts were found deficient, they were held personally liable and they had to cover their responsibilities when they were appointed by an appropriate bond.

I am not advocating exactly that Draconian measure, but I am advocating that the District Director of Customs be held subject to a civil action for damages by the affected domestic industry in those instances where due to negligence antidumping duties and countervailing duties are not collected, entries are liquidated without the payment of such duties to the detriment of the domestic industry.

That particular provision would put some emphasis upon the need of the District Director, more effectively to manage this particular function and to see to the capabilities and the management of the personnel under his supervision that do the job.

Thank you, Mr. Chairman, for listening to my testimony.

[The statement of Mr. Stewart follows:]

EUGENE L. STEWART, ESQ.

Congressional concern for the lack of accounting controls in the U.S. Customs Service's collection process is warranted. The problems in the assessment and collection of duties have made it difficult for domestic industries facing unfair trade competition to procure timely and effective relief.

I share with you the experience of The Timken Company which establishes that the system is not working in the manner Congress intended.

Timken in October 1973 initiated an antidumping proceeding by filing a complaint with the Treasury Department that tapered roller bearings ("TRBs") from Japan were being or were likely to be sold at less than fair value ("LTFV") in the United States with consequent injury to the domestic tapered roller bearing industry.

Instead of promptly publishing a finding of dumping, the Secretary of Treasury delayed and ordered that unliquidated entries between the preliminary determination on June 5, 1974, and the date of the finding of dumping, August 18, 1976, be appraised and liquidated. Timken contested the Secretary's effort to relieve this body of entries from susceptibility to the imposition of antidumping duties; its objections were sustained in July 1976 by the District of Colombia Court of Appeals.

Since the issuance of the 1976 dumping finding, Timken has been unable to prevent unlawful and premature liquidation of entries of Japanese TRBs. On several occasions, the Department of Commerce and its predecessor, the Department of Treasury, caused or permitted entries of tapered roller bearings from Japan to be liquidated without imposing antidumping duties.

The law requires that merchandise subject to a finding of dumping or an antidumping duty order be subject to suspension of liquidation, i.e., the entry cannot be liquidated until antidumping duties have been levied. At the time of entry, the importer must pay a cash deposit equal to the amount of estimated antidumping duties. Absent collection of cash deposits and ongoing continued suspension of liquidation, the domestic industry does not receive the full measure of relief contemplated by the antidumping duty law.

By 1978 there was a substantial body of unliquidated entries that had been accumulating since June 1974. Accordingly, on January 30, 1979, Timken filed three separate American Manufacturer's petitions. One requested that Customs determine the amount of antidumping duties to be assessed on TRBs from Japan; the second challenged the Secretary's non-assessment of antidumping duties and requested prompt assessments; and the third contended that the appraised values for Japanese TRBs were too low. In a letter dated June 24, 1980, the U.S. Customs Service notified Timken's counsel that there had been no appraisements and no liquidations of entries of TRBs from Japan since 1972. The Customs Service was in error, as I will explain in a moment.

As of January 2, 1980, the administrative responsibility for antidumping duty assessment determinations was transferred from Customs to the newly created International Trade Administration within the Department of Commerce.

In 1980, Timken's American Manufacturers petitions were referred by the Treasury to the new authority, the International Trade Administration. The General Counsel's office of the ITA advised us that it viewed the protests to be no longer applicable. No decision was ever made on the protests.

On April 13, 1979, Customs officers at the ports of entry were advised by Customs headquarters that shipment's of TRBs imported during the period June 1974 through December 31, 1976, exported from Japan to the United States by NTN were free of dumping liability; that these shipments could be appraised and the applicable entries liquidated; lastly, that "Appraisement will continue to be withheld on shipments of this merchandise not covered by this or other supplements." An identically worded circular covering shipments of TRBs purchased during the period January 1, 1977, through March 31, 1978, and exported by NTN, was issued on May 14, 1979.

Together, these master lists covered shipments of TRBs purchased during the period June 1974, through March 31, 1978, and exported to the United States by NTN. Customs officers were thus advised in April that the shipments of TRBs could be appraised and the entries liquidated free of dumping duty liability. In July and August 1979, Customs officers in the Chicago Customs District appraised and liquidated, free of dumping duty liability, a significant number of the hundreds of NBCA entries of

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NTN's TRBs covered by the antidumping finding. This too proved to be erroneous.

By Telex of August 1980 Customs reversed its prior instructions as erroneous. Customs officers in the field were directed to suspend immediately the liquidation of entries that were the subject to outstanding dumping duty master lists. Again, on November 25, 1980, the Regional Commissioners of Customs were reminded of the suspension of liquidation of entries covered by pre-1980 master lists pending resolution by the ITA of whether such entries were covered by an administrative review. By Telex of March 25, 1981, Customs Headquarters advised the field that suspension would stay in effect until the completion of the administrative review.

Relying on the two NTN TRB master lists issued in April and May 1979, and despite the superceding instructions in August and November, 1980, however, the Import Specialist in Chicago appraised and liquidated over 270 entries of NTN's TRBs in the first half of 1981. This action was concurred in by the District Director despite the issuance of the August 1980 telex, the November 25, 1980, memorandum, the suspension statement in the Federal Register notice of February 1981, and the suspension direction in the Headquarters' Telex of March 1981.

Late in October 1981, counsel for plaintiff Timken learned of the large number of entries covering TRBs produced by NTN that had been liquidated earlier that year by Customs officers within the Chicago Customs District.

Despite efforts by Timken to correct the illegal liquidations, the liquidations were not voided.

After pursuing without success administrative remedies, Timken brought suit to prevent the unlawful and premature liquidation of TRB entries. The suit was brought against the responsible officials in the Treasury and Commerce Departments, seeking damages in the amount of $30 million. The suit is stayed pending resolution of a related case challenging the revocation of the order as to NTN.

Not only were entries of NTN's bearings liquidated unlawfully without A/D duties, entries of TRBs from certain Japanese producers have been imported for sixteen years without even an estimated A/D duty deposit because ITA has not completed the first annual review of the order under 19 U.S.C. § 1675.

On June 15, 1982, the International Trade Administration ("the ITA") published the final results of its administrative review of the dumping order concerning NTN. ITA granted NTN's request for partial revocation of the finding as to NTN's imports. The ITA stated that it had found no LTFV sales by NTN or NBCA. In revoking the antidumping finding on TRBs for all sales between April 1, 1978 through November 14, 1979, the ITA instructed Customs Service to liquidate all entries in that period without regard to dumping duties. As I will explain, this was a massive error.

Timken initiated a suit in the U.S. Court of International Trade challenging the partial revocation of the dumping finding. Timken sought a preliminary injunction restraining liquidation of NTN's entries of TRBs pending the outcome of the litigation. The court initially denied the injunction, but on motion for rehearing, enjoined liquidation of NTN's entries. What followed was three remands of the case by the court to the agency for correction of methodological and clerical errors. On March 23, 1990, ITA finally issued the final results of the third remand. The agency found significant dumping margins of 38.29% confirming Timken's belief that NTN had not changed its discriminatory pricing strategy despite the 1976 antidumping finding. All of the hundreds of entries erroneously liquidated in the interim without payment of any dumping duty should have been assessed duties at the 38.29% rate!

During the pendency of the remand proceedings, NTN was not required to post cash deposits pursuant to the 1976 dumping finding, or to pay estimated antidumping duties. Through five years of litigation concerning revocation of the order with respect to NTN, Timken watched its U.S. sales of TRBs decline, its markets disappear, its profits turn to losses, and its workers dismissed. The company's first losses since the Depression were recorded in the aftermath of the 1982 revocation order.

The severity of the harm, the lack of any price movement in the U.S. market despite a massive increase in the value of the yen in 1985 and 1986, and extraordinarily low prices from a number of countries led Timken to file a new antidumping petition in 1987.

Once the petition was filed, however, NTN immediately sought to halt the investigation. Despite both an affirmative finding at the ITA and ITC, that action has been and continues to be the subject of court challenges.

The failure of the Department to complete reviews of the 1976 A/D finding has deprived Timken and the domestic industry relief from injurious, unfairly traded imports. The antidumping finding in the underlying investigation has been in effect since August 1976, applicable to entries since June 1974. Since that time, the Department has failed to complete and publish reviews covering sales of TRBs as far back as 1974. There are now 14 years of entries subject to the 1976 antidumping order. Yet, there is no record of the entries for which liquidation, in fact, is actually suspended or, to date, any mechanism for ensuring that entries are not liquidated without the Department's knowledge.

In January 1988, Timken specifically requested that the Department, Office of Compliance, obtain confirmation from the Customs Service that suspension of liquidation in fact had occurred in order to prevent premature liquidation, failure to suspend liquidation, or failure to collect required estimated duties. Timken's letter included a proposed questionnaire to be mailed to the 20 ports that account for the largest volume of TRBs from Japan. Timken, however, is not informed of any action having been taken.

The Department is obligated to ensure the assessment of the proper amount of antidumping duties. Section 751 of the Tariff Act charges the ITA with the responsibility to instruct Customs regarding entries to be liquidated, the assessment rate, and the estimated duty rate for entries for which liquidation is suspended. Customs must suspend liquidation of the appropriate entries, collect the correct estimated duties, and liquidate entries subject to a final section 751 determination at the correct duty assessment rate.

In early 1988, an importer of TRBs from Japan notified the Department of Commerce that certain of its entries had been liquidated, contrary to standing orders issued by Commerce to Customs. Liquidation was apparently caused by a misreading of an ITA November 1980 telex to Customs, which identified the importer among twelve other companies as <u>not</u> to be liquidated. A consistent misreading of the same telex might have just as easily resulted in entries of other major tapered roller bearing manufacturers in Japan being liquidated unlawfully.

Timken also requested on May 6, 1988, that the Department also conduct an internal investigation, to determine whether other importers' entries had been improperly liquidated. A follow-up letter was sent to

the agency on June 6, 1988. Commerce letter, dated April 12, 1989, provided annual totals of the value of entries subject to suspension of liquidation and the amount of cash deposits collected in the proceeding during the period 1986-1988.

On June 20, 1989, Timken showed that the volume of imports reported by Commerce as subject to suspension of liquidation was far less than the import volume reported in the public version questionnaire responses of just two Japanese producers, NSK and Koyo which represented only a part of the total annual imports of TRBs from Japan.

Table 1
Comparison of ITA Data to Publicly Available Data
On Import Volumes of Tapered Roller Bearings

Year	IM 145X Data Bur. of Census	Total Reported by NSK & Koyo	Total Reported by ITA
1986	$92,862,489	Not Avail.	$6,164,351
1987	$91,497,962	$16,900,000	$10,578,248
1988 (9 mos.)	$62,104,131	$17,400,000	$6,768,396

Source: Timken Submission to Department of Commerce, June 20, 1989, at 3.

Counsel for Timken had requested in a May 6, 1988 letter to the Department that it address this problem. The Department assured Timken's counsel that a procedure for addressing this problem would be proposed by the end of May 1988. As of May 1, 1990, two years later, there have been no steps taken to compile a listing of suspended entries, liquidated entries, or the amount of duty collected or assessed.

The integrity of the system of antidumping laws is dependent upon the efficiency of the administrative agencies charged with their administration. On at least two occasions in the past, as highlighted in this testimony, Timken has suffered the effects of premature liquidation of entries subject to an outstanding order, before antidumping duties were levied. The problems faced by domestic industries stem from a failure by the Customs Service correctly to implement the Department of Commerce's antidumping and countervailing duty orders, the lack of coordination between the agencies and inadequate reporting requirements.

Both the Subcommittee on Oversight and the GAO have made recommendations for improving the system for assessment and collection of antidumping and countervailing duties. These proposals, while broad in nature, provide a building block for implementing concrete measures to correct existing problems in the system.

We are generally supportive of the Subcommittee's and GAO's recommendations and offer the following specific changes to ensure that the remedial objectives of the unfair trade laws are achieved.

1. Amend Section 520 [19 U.S.C. § 1520]

Section 520 should be amended to add the following new subsection:

> (e) Reliquidation of entries to assess antidumping or countervailing duties. Notwithstanding section 1514(a), the appropriate Customs Officer shall reliquidate any entry necessary to correct the failure of the Customs Service to assess and collect an antidumping or countervailing duty properly assessed on such entry pursuant to section 736 [19 U.S.C. § 1673e(a)] or 706 [19 U.S.C. § 1671e(a)], but not assessed and collected in the initial liquidation; provided, that such reliquidation must occur within 18 months of the liquidation coming to the attention of the Commerce Department and an assessment rate pursuant to section 751 [19 U.S.C. § 1675] being established.

The proposed change would provide a third exception to section 514 (19 U.S.C. § 1514). Pursuant to section 514 reliquidation must occur within 90 days unless a protest is filed. Section 1520(c) currently provides only for reliquidation within one year of entry for clerical errors, mistake of fact, or other inadvertence.

2. Amend Current Documentation and Reporting Requirements

Customs should have a reliable system for tracking estimated antidumping or countervailing duties paid, outstanding duties owed and entries liquidated each month. It should also be the responsibility of the Department of Commerce to keep abreast of duties paid, duties still owed and entries liquidated each month. We therefore recommend the following changes to improve the tracking and reporting of antidumping and countervailing duties.

a. Documentation Requirements

1) At the time of entry of imported merchandise into U.S. territory, require importers whose merchandise is subject to a preliminary affirmative antidumping or countervailing duty determination to provide on the Customs entry form in the space next to the consumption entry number, the designation A/D or CVD so as to clearly mark which goods are subject to at least a preliminary determination of sales at less than fair value or to countervailable duties. In addition, as specified now in Customs Directive 3550-33, dated May 24, 1989, the importer, entry clerk and import specialist should be responsible for recording "directly below

the HTS number, the appropriate antidumping/countervailing duty case number(s) as assigned by the Department of Commerce, International Trade Administration." CD 3550-33 at 16.

2) At the Customs House, the entry clerk should review proffered entries to ensure that such designation has been made. Incorporate into the entry form a line for estimated dumping or countervailing duty rate to be verified by the entry clerk. Require the import specialist in processing the entry for classification and appraisement to list on the duty summary the amount of dumping or countervailing duty to be assessed pursuant to a final affirmative determination in the annual review process by Commerce.

3) After final determinations i.e., after publication of antidumping or countervailing duty orders and the final section 751 administrative review duty assessment rates, but before proceeding to liquidation of entries, the import specialist and the liquidator in the District Director's Customs office must confirm from the entry papers and the duty assessment summary the following information: ordinary duties payable, countervailable and antidumping duty rates, estimated duties paid and balance if any owed.

b. Reporting Requirements

1) Monthly Port of Entry Reports: Require Customs officials at each port of entry to submit monthly computerized reports identifying by tariff classification the number of entries and the total volume (and value) of imports subject to antidumping and/or countervailing duties, the ordinary duties paid, and the total cash deposits of antidumping and countervailing duties paid and the total of such duties to be paid. The report should also identify the total amount of entries liquidated. This report should be submitted to Customs Headquarters and to the office of Compliance at the Department.

2) ITA Summaries: Require the Department of Commerce after receiving the monthly reports from the port officials to prepare monthly summaries of the Customs report. The report should be made available to counsel for petitioners and other interested parties on the basis of an appropriate confidentiality agreement.

The changes proposed have many benefits including: (1) requiring detailed reporting regarding entries subject to antidumping or countervailing preliminary or final determinations causing discipline in

Customs to pay closer attention to see that proper duties are assessed, (2) requiring Customs and Commerce to review entries not liquidated for imports covered by preliminary dumping or countervailing duty determinations and (3) enabling Commerce and counsel for interested parties to monitor the extent to which the intent of this law for prompt collection and timely periodic assessment of first A/D and CVD duties is being carried out.

3. Amend Statute to Reinstitute Fiscal Responsibility for Negligent Acts of Customs Officers

In the 14 years since the issuance of the antidumping finding in tapered roller bearings, there have been several instances of negligent administration. Those officials at Customs responsible for authorizing premature liquidation have not been held liable for their acts of negligence which have resulted in uncollected duties. If the district director of customs were held personally liable for negligent acts committed under his command, there would be greater incentive on his or her part to utilize more care in the selection of the people in the field and in the management of those people.

We therefore recommend as one method for ensuring a more reliable accounting of antidumping and countervailing duties, that the Customs Service be held accountable in a civil action by the injured industry for the full and proper collection of duties on merchandise subject to antidumping or countervailing duties. The Customs Service should be liable for unwarranted acts such as negligence, and for all uncollected or improperly collected duties.

As outlined in this report, the scope of the problem should not be underestimated. To ensure that the remedial statute is being effectively enforced it is necessary to amend the law to promote a greater degree of cooperation between the Customs Service and the Department of Commerce. In addition, in light of the profound enforcement problems, exemplified by Timken's experience, it is necessary to amend the law to provide for greater accountability and accuracy in the system.

TESTIMONY OF EUGENE L. STEWART, ESQ.
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

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BEFORE THE
SUBCOMMITTEE ON OVERSIGHT
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

HEARINGS ON THE COMMERCIAL OPERATIONS
OF THE U.S. CUSTOMS SERVICE

MAY 3, 1990

STATEMENT OF EUGENE L. STEWART

The following testimony is based on my 39 years of experience in the private practice of law, specializing in the customs and trade remedy field. During this period, I have represented, exclusively, domestic industries and my law firm is responsible for the existence of more antidumping and countervailing duty orders than any other law firm. Based on that experience, I concur with reports submitted by the Subcommittee on Oversight of the House Ways and Means Committees and the General Accounting Office ("GAO") concerning the inability of administrative agencies to assess and collect duties as intended by Congress. To illustrate the gravity of these problems, the saga of a failed administration of the antidumping assessment and collection laws is exemplified by the tapered roller bearing cases.

My statement will: (1) identify weaknesses in antidumping duty assessment procedures, particularly reviewing the experience of the domestic bearing industry in seeking relief under the trade laws from unfair competition; and (2) identify concrete steps to reform the process to ensure more effective and timely relief.

I. ANTIDUMPING DUTIES ARE NOT BEING COLLECTED

Congressional concern for the lack of accounting controls in the U.S. Customs Service's collection process is warranted. Profound enforcement problems exist due to this lack of coordination between the agencies in charge of enforcing the antidumping and countervailing duty laws and due to inadequate reporting requirements. A report prepared by the GAO entitled "Import Duties: Assessment of Duties on Unfairly Priced Imports Not Reviewed," GGD-89-125, dated September 1989 concluded that "assessment of [antidumping duties] is not being fully administered." GAO Report at 6. The report further indicates that fundamental problems in the coordination efforts between Customs and the Department of Commerce exist. The study noted that "[a]lthough Customs provides Commerce with a report covering the assessment of special duties, Commerce has not used the data to determine whether Custom has assessed the established amounts." GAO Report at 2.

More recently, the Subcommittee on Oversight issued a report in which it also concluded that "the U.S. Customs Service cannot ensure that it is properly enforcing antidumping and countervailing duty orders issued by the Department of Commerce." Subcommittee on Oversight Report, titled "Abuses and Mismanagement in U.S. Customs Service Commercial Operations," dated February 1990. In that report, the Subcommittee notes that:

> Customs has done a poor job of enforcing antidumping and countervailing duty (AD/CVD) laws, due mainly to an inaccurate and archaic system for collecting key information. Customs cannot report the amount of duty actually collected for a specific AD/CVD case and does not have an adequate system in place for anticipating attempts by importers to circumvent the AD/CVD orders

issued by the Department of Commerce. Confusion over the joint responsibilities of the Department of Commerce and Customs has also damaged the enforcement effort.

The problems in the assessment and collection of duties have made it difficult for domestic industries facing unfair trade competition to procure timely and effective relief.

II. EXPERIENCE OF DOMESTIC INDUSTRY IN SECURING ENFORCEMENT OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS

Over the years that I have represented The Timken Company in trade matters, I have become aware of the difficulties that exist in the administration of the antidumping and countervailing duty laws by the Department of Commerce and the Customs Service. For this reason, I share with you the experience of The Timken Company which establishes that the system is not working in the manner Congress intended.

A. BACKGROUND

Timken in 1974 initiated an antidumping proceeding by filing a complaint with the Treasury Department that tapered roller bearings ("TRBs") from Japan were being or were likely to be sold at less than fair value ("LTFV") in the United States with consequent injury to the domestic tapered roller bearing industry. This ripened into a final determination of dumping (i.e. sales at less than fair value) and a determination by the International Trade Commission, then the Tariff Commission, that Timken and the domestic industry were being threatened with injury by reason of the importation of tapered roller bearings from Japan.

From the very beginning of this investigation covering shipments of TRBs from Japan, Timken was concerned that there be enforcement of the finding of dumping to which it was entitled by reason of these affirmative determinations of dumping and injury. Instead of promptly publishing a finding of dumping, the Secretary of Treasury delayed and ordered that unliquidated entries between the preliminary determination and the June 1974 order be appraised and liquidated. Timken contested the Secretary's effort to relieve this body of entries from suspectibility to the imposition of antidumping duties; its objections were sustained in July 1976 by the District of Colombia Court of Appeals. Timken v. Simon, 539 F.2d 221 (D.C. Cir. 1976). The next month, August 1976, the Secretary published the dumping finding that should have been promulgated in February 1975, a delay of over a year in the imposition of antidumping duties. Tapered Roller Bearings from Japan, 41 Fed. Reg. 34,974 (August 18, 1976). The result of the publication of this finding was to continue in effect the order of June 5, 1974, directing the withholding of appraisement of entries of tapered roller bearings. 39 Fed. Reg. 19969.

Since the issuance of the 1976 dumping finding, however, Timken has been unable to prevent unlawful and premature liquidation of entries of Japanese TRBs. On several occasions, the Department of Commerce and its predecessor, the Department of Treasury, caused or permitted entries of tapered roller bearings from Japan to be liquidated without imposing antidumping duties.

The law requires that merchandise subject to a finding of dumping or an antidumping duty order be subject to suspension of liquidation, i.e., the entry cannot be liquidated until antidumping duties have been levied. At the time of entry, the importer must pay a cash deposit equal to the amount of estimated antidumping duties. Absent collection of cash deposits and ongoing continued suspension of liquidation, the domestic industry does not receive the full measure of relief contemplated by the antidumping duty law.

B. IN THE AFTERMATH OF THE 1976 ANTIDUMPING FINDING, TIMKEN DISCOVERS PREMATURE LIQUIDATION OF ENTRIES MANUFACTURED BY A MAJOR JAPANESE PRODUCER

1. Timken's Efforts to Determine Amount of Antidumping Duties Being Assessed Are Unsuccessful

For a period of more than two years following the dumping finding

in 1976, there was no public indication that the Customs Service was determining or assessing the amount of antidumping duties on imported tapered roller bearings. By 1978 there was a substantial body of unliquidated entries that had been accumulating since around mid-1974. Accordingly, on January 30, 1979, Timken filed three separate American Manufacturer's petitions in accordance with the provisions of section 516 of the Tariff Act of 1930, as then in effect.[1] One requested that Customs determine the amount of antidumping duties to be assessed on TRBs from Japan; the second challenged the Secretary's non-assessment of antidumping duties and requested prompt assessments; and the third contended that the appraised values for Japanese TRBs were too low. In a letter dated June 24, 1980, the U.S. Customs Service notified Timken's counsel that there had been no appraisements and no liquidations of entries of TRBs from Japan since 1972. Customs therefore claimed that Timken's protests were premature and declined to exercise jurisdiction. It would be later discovered that the Customs Service was in error as discussed infra.

On July 26, 1979, Public Law 96-39 was signed into law (Trade Agreements Act of 1979), providing for new annual assessment proceedings [19 U.S.C. § 1675] and requiring reorganization of U.S. trade functions. Effective January 1, 1980, the Antidumping Act, 1921, was repealed and the antidumping provisions in Title 1 of the Trade Agreements Act of 1979 went into effect. As of January 2, 1980, the administrative responsibility for antidumping duty assessment determinations was transferred from Customs to the newly created International Trade Administration within the Department of Commerce.

In 1980, Timken's American Manufacturers petitions were referred by the Treasury to the new authority, the International Trade Administration, who was placed in responsibility of the administration of the Antidumping Act with the passage of the Trade Agreements Act of 1979. The General Counsel's office of the ITA consulted with counsel for Timken and advised us that it viewed the protests to be no longer applicable. Instead, all unliquidated entries would be subject to an administrative review discussed infra.

2. Liquidation of entries covered by Master Lists Issued in 1979

In April and May 1979, Customs Headquarters issued antidumping duty instructions to the field regarding imports of TRBs including those imports of NTN Toyo Company, Ltd. Japan ["NTN"], who is and was a major Japanese manufacturer of TRBs. Throughout the 1970's and continuing into the present, NTN had been and continues to be exporting a substantial volume of TRBs to the United States. These TRB products were then imported principally by NTN's U.S. sales subsidiary, NTN Bearing Corporation of America ("NBCA"). TRBs exported by NTN and imported by NBCA, and other firms, were subject to the finding of dumping covering TRBs from Japan and to the related withholding of appraisement/suspension of liquidation order.

By Customs Information Exchange circular, dated April 13, 1979, Customs officers at the ports of entry were advised that shipment's of TRBs imported during the period April 1, 1974, through December 31, 1976, that were exported from Japan to the United States by NTN were free of dumping liability; they were further advised that these shipments could be appraised and the applicable entries liquidated; lastly, they were advised that "Appraisement will continue to be withheld on shipments of this merchandise not covered by this or other supplements." C.I.E. N-526/73, Suppl. #40. An identically worded circular covering shipments of TRBs purchased during the period January 1, 1977, through March 31, 1978, and

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1 Timken also sought information from the Custom Service concerning the status of the imported Japanese TRBs, the appraised value of the entries, and the assessment instruction, if any. The information was sought under the Freedom of Information Act (FOIA) requests asking that Customs disclose its determination regarding Japanese imports. Timken Co. v. United States Customs Serv., 491 F. Supp. 557 (1980); Timken Co. v. U.S. Customs Serv., 531 F. Supp. 194 (1981).

exported by NTN, was issued on May 14, 1979; this circular also advised Customs officers to withhold appraisement of shipments of TRBs exported by NTN. C.I.E. N-526/73, Suppl. #48.

Together, these master lists covered shipments of TRBs purchased during the period April 1, 1974, through March 31, 1978, and exported to the U.S. by NTN. Customs officers were thus advised in April that the shipments of TRBs could be appraised and the entries liquidated free of dumping duty liability. In July and August 1979, Customs officers in the Chicago Customs District appraised and liquidated, free of dumping duty liability, a significant number of the hundreds of NBCA entries of NTN's TRBs covered by the antidumping finding. Having received the master lists, the Import Specialist in the Chicago District for the U.S. Custom Service processed for liquidation 98 entries by NBCA of TRBs exported by NTN.

By Telex of August 1980, however, Customs reversed its prior erroneous instructions, Customs officers in the field were directed to suspend immediately the liquidation of entries that were the subject to outstanding dumping duty master lists. Again, on November 25, 1980, the Regional Commissioners of Customs were reminded of the suspension of liquidation of entries covered by pre-1980 master lists pending resolution by the ITA of whether such entries were covered by an administrative review. On February 27, 1981, the ITA published notice in the preliminary results of its review of imports of NTN that liquidation had been suspended on pre-1980 entries of NTN-produced TRBs covered by master lists issued by Customs pending a determination regarding ITA's obligation to review such entries. 46 Fed. Reg. 14371. By Telex of March 25, 1981, Customs Headquarters advised the field that suspension would stay in effect until the completion of the administrative review.

Relying on the two NTN TRB master lists issued in April and May 1979, and despite the superceding interactions in August and November, 1980, the Import Specialist in the Chicago office appraised and liquidated over 270 entries of NTN's TRBs in the first half of 1981. The Import Specialist's action in liquidating the entries was concurred in by the supervisor despite the issuance of the August 1980 telex, the November 25, 1980, memorandum, the suspension statement in the Federal Register notice of February 1981, and the suspension direction in the Headquarters' Telex of March 1981.

3. Events leading up to Timken filing suit

Late in October 1981, counsel for plaintiff Timken learned of the large number of entries covering TRBs produced by NTN that had been liquidated earlier that year by Customs officers within the Chicago Customs District. An examination of the Customs Service's Quarterly Duty Assessment Entry Status Report (C.F. 5557) for December 31, 1980, and June 30, 1981, showed that the 272 entries covered by the master lists issued in April and May 1979 that had been liquidated by Chicago Customs over the first half of 1981. The review also indicated that Customs officers at Chicago had liquidated during the first six months of 1981 about 138 entries of NTN-produced imported from May 2, 1978, through September 1, 1979.

An examination of the monthly Bulletin Notice of Entries Liquidated within the Chicago Customs District confirmed that a large number of TRB entries that were the subject of express suspension of liquidation instructions had, in fact, nevertheless been liquidated by Chicago Customs officers during the first six months of 1981. A review of more recent Bulletin Notices gave reason to believe that Customs officers at Chicago were still upon occasion at that time liquidating entries of NTN-produced TRBs without the imposition of antidumping duties.

Thus, despite the fact that Customs Headquarters had explicitly directed field officers not to liquidate NTN TRBs entries on the basis of the outstanding NTN TRB master lists, those orders were not heeded by the import specialist nor the supervisor at the Chicago office having immediate responsibility over NTN TRB entries by NBCA. Despite efforts by Timken to correct the illegal liquidations, the liquidations were not voided.

After pursuing without success the administrative remedies discussed above within the Custom Service and Commerce, Timken brought suit to prevent the unlawful and premature liquidation of TRB entries to seek judicial relief. The suit was brought against the responsible officials in the Treasury and Commerce Departments, seeking damages in the amount of $30 million. Timken v. Regan, 552 F. Supp. 47 (1982). Even though it is clear that Customs improperly liquidated entries, Timken v. Regan is stayed pending resolution of a related case challenging the revocation of the order as to NTN.

C. TIMKEN'S EXPERIENCE IN THE 1980s: DENIED PROMPT ASSESSMENT OF ANTIDUMPING DUTIES

The antidumping law is intended to be remedial in nature. "It was designed to protect domestic industry from sales of imported merchandise" at LTFV. Badger-Powhatan, a Div. of Figgie Int., Inc. v. United States, 608 F. Supp. 653, 656 (1985). Nonetheless, Timken has secured no relief, despite its best efforts, indeed, not only were entries of NTN's bearings liquidated unlawfully without A/D duties, entries of TRBs from certain Japanese producers have been imported for sixteen years without even an estimated A/D duty deposit because ITA has not completed the first annual review of the order under 19 U.S.C. § 1675. Congress intended the domestic industry injured from unfair trade competition to get prompt relief. As trade matters involving TRBs illustrate, however, the system does not work as intended by Congress. It has not provided an effective deterrent against importers who engage in unfair trade practices.

1. Litigation Regarding Revocation of the Order as to NTN

On November 14, 1979, the Treasury Department published its "Notice of Tentative Determination to Modify or Revoke a Dumping Finding" limited to TRBs manufactured by NTN and imported by NBCA. 44 Fed. Reg. 65690. In that determination, the Treasury preliminarily found that NTN and NBCA had not sold TRB's at less than fair value ("LTFV") from April 1, 1974 through March 31, 1978.

By letter dated December 13, 1979, counsel for Timken filed an opposition to the preliminary findings in the November 14, 1979 "Notice of Tentative Determination." Letter from Eugene L. Stewart, Esq. to Hon. Robert Chasen. In that letter, counsel for Timken showed that tapered roller bearings from NTN and NBCA were being sold at LTFV.

On June 15, 1982, the International Trade Administration ("the ITA") published the final results of its administrative review of the dumping order concerning NTN and NBCA. 47 Fed. Reg. 25757 (1982). ITA granted NTN's request for partial revocation of the finding as to NTN's imports. 47 Fed. Reg. 25,757 (June 15, 1982). In that final determination the ITA stated that it had found no LTFV sales by NTN or NBCA. In revoking the antidumping finding on TRBs for all sales between April 1, 1978 through November 14, 1979, the ITA instructed Customs Service to liquidate all entries in that period without regard to dumping duties. Id. at 25759.

Timken initiated a suit in the U.S. Court of International Trade, challenging the partial revocation of the dumping finding. As part of the relief requested, Timken sought a preliminary injunction restraining liquidation of NTN's entries of TRBs pending the outcome of the litigation. The court initially denied the injunction, but on motion for rehearing, enjoined liquidation of NTN's entries. The Timken Company v. United States, 569 F. Supp. 65 (1983). What followed was three remands to the agency for correction of methodological and clerical errors. On March 23, 1990, ITA finally issued the final results of the third remand. The agency found significant dumping margins of 38.29% confirming Timken's belief that NTN had not changed its discriminatory pricing strategy despite the 1976 antidumping finding.

During the pendency of the remand proceedings, although liquidation had been suspended, NTN was not required to post cash deposits pursuant to the 1976 dumping finding, or to pay estimated antidumping duties. Through five years of litigation concerning revocation of the order with respect to NTN, Timken watched its U.S. sales of TRBs decline,

its markets disappear, its profits turn to losses, and its workers dismissed. The company's first losses since the Depression were recorded in the aftermath of the 1982 revocation order.

The severity of the harm, the lack of any price movement in the U.S. market despite a massive increase in the value of the yen in 1985 and 1986, and extraordinarily low prices from a number of countries led Timken to file a new antidumping petition in 1987. The new petition was founded on fresh evidence that in 1985 and 1986 imports from six countries, including all TRBs from Japan not at the time covered by an antidumping order, were being sold at LTFV.

Once the petition was filed, however, NTN immediately sought to halt the investigation. Despite both an affirmative finding at the ITA and ITC, that action has been and continues to be the subject of court challenges.

2. Failure of the Department to Complete Administrative Reviews Also Serves to Delay Remedial Effect of an Antidumping Finding

The failure of the Department to complete reviews in this case has also deprived Timken and the domestic industry from relief of unfairly traded imports. The antidumping finding in the underlying investigation has been in effect since August 1976. Since that time, however, the Department has failed to complete and publish reviews covering sales of TRBs as far back as 1974. Because of the current backlog of annual review proceedings, there are now 14 years of entries subject to the 1976 antidumping order. Yet, there is no record of the entries for which liquidation, in fact, is actually suspended or, to date, any mechanism for ensuring that entries are not liquidated without the Department's knowledge.

Counsel for Timken requested in a May 6, 1988 letter to the Department that it address this problem. The Department assured Timken's counsel that a procedure for addressing this problem would be proposed by the end of May 1988. As of May 1, 1990, two years later, there have been no steps taken to compile a listing of suspended entries, liquidated entries, or the amount of duty collected or assessed. Throughout the period, the Customs Service has made no meaningful report to the ITA or Timken on the status of entries of the merchandise subject to the investigation. It should be noted that Customs this year has implemented a new computerized system to alert the ports of those imports that are the subject of A/D duties and duty deposits and to track collection of such duties. While Customs should be commended, this system will do nothing to improve the situation with respect to 14 years of importatations of tapered roller bearings from Japan.

3. Lack of Coordination Between the Agencies Responsible for Assessment and Collection of Duites Results in Another Incident of Premature Liquidation of TRBs

Pursuant to the Trade Agreements Act of 1979, the Commerce Department, International Trade Administration has the responsibility for ensuring that entries of merchandise subject to antidumping orders are not liquidated prematurely. Customs, which retains ministerial responsibility for the liquidation status of entries, has a system (albeit an inadequate one) for identifying such entries and assuring that they are not liquidated prior to final assessment of antidumping duties.

During the 1980s, Timken repeatedly requested assurances from officials of the Commerce Department and the Customs Service that entries subject to the outstanding dumping order remained subject to suspension of liquidation. However, in a series of meetings in 1988 with officials from Commerce and Customs, Timken was informed that the system in place did not permit identification of the actual number or value of entries which are properly subject to suspension of liquidation under any particular order. Forms may or may not be filled out. Thus, if entries were immediately liquidated, they were not identified as being subject to antidumping scrutiny.

In January 1988, in a letter to the Department, Timken specifically requested that the Department, Office of Compliance, obtain

confirmation from the Customs Service that suspension of liquidation in fact had occurred in order to prevent premature liquidation, failure to suspend liquidation, or failure to collect required estimated duties. Letter dated January 27, 1988. Timken's letter included a proposed questionnaire to be mailed to the 20 ports that account for the largest volume of TRBs from Japan. Timken, however, was not informed by the agency of any action taken.

The Department was and is obligated to ensure that the annual review process results in the assessment of the proper amount of antidumping duties. Section 751 of the Tariff Act of 1930, as amended (19 U.S.C. § 1675), charges the ITA with the responsibility to instruct Customs regarding entries to be liquidated, the assessment rate, and the estimated duty rate for entries for which liquidation is suspended. Customs duties in this regard are ministerial; Customs must suspend liquidation of the appropriate entries, collect the correct estimated duties, and liquidate entries subject to a final section 751 determination at the correct duty assessment rate.

In early 1988, despite the Department's statutory obligation to ensure compliance by Customs, however, an importer, Yamaha Motor Co. ("Yamaha") of TRBs from Japan notified the Department of Commerce that certain of its entries had been liquidated, contrary to standing orders issued by Commerce to Customs. Liquidation of the TRBs including those produced by Yamaha had been suspended for a 1985-1986 administrative review period. Liquidation was apparently caused by a misreading of an ITA November 1980 telex to Customs, which identified Yamaha among twelve other companies as not to be liquidated. A consistent misreading of the same telex might have just as easily resulted in entries of other manufacturers and exporters, including Koyo Seiko ("Koyo") and Nachi Fujikoshi ("Nachi") and Nippon Seiko K.K. ("NSK") -- the major tapered roller bearing manufacturers in Japan --being liquidated unlawfully.

Although Commerce subsequently issued to Customs a communication clarifying its original instructions, Timken requested on May 6, 1988 that the Department also conduct an internal investigation, to determine whether other importers' entries had been improperly liquidated. A follow-up letter was sent to the agency on June 6, 1988. Commerce's response to repeated requests on the Company's behalf was almost a year in preparation and when received, left open more questions than it resolved. The Commerce letter, dated April 12, 1989, provided annual totals of the value of entries subject to suspension of liquidation and the amount of cash deposits collected in the proceeding during the period 1986-1988.

On June 20, 1989, counsel for the Company commented on the Department's substantial understatement of the value of entries subject to suspension of liquidation and the amount of cash deposits collected. Timken showed that the volume of imports reported by Commerce as subject to suspension of liquidation was far less than the import volume reported in the public version questionnaire responses of just two Japanese producers, NSK and Koyo which represented only a part of the total annual imports of TRBs from Japan, as derived from official import statistics. The following table will illustrate the extent of the discrepancies between the classes of data.

Table 1
Comparison of ITA Data to Publicly Available Data
On Import Volumes of Tapered Roller Bearings

Year	IM 145X Data Bur. of Census	Total Reported by NSK & Koyo	Total Reported by ITA
1986	$92,862,489	Not Avail.	$6,164,351
1987	$91,497,962	$16,900,000	$10,578,248
1988 (9 mos.)	$62,104,131	$17,400,000	$6,768,396

Source: Timken Submission to Department of Commerce (June 20, 1989) at 3.

The data to which the ITA figures reported are compared are estimates. The data in column 1, for example, may include imports not subject to the antidumping duty order, as the 1976 finding covers only certain bearing sizes. Similarly, the data in column 2 represent public summaries of confidential data, accurate to within ± 10%, and are extrapolated to correspond to calender years rather than 12-month "review periods." Yet, even assuming some margin of error in the comparison data, the fact remains that the import volume reported by ITA to be subject of liquidation represented a mere fraction of the estimated volume of TRBs imports from Japan during the corresponding periods. The amount of cash deposits therefore reportedly collected on imports of TRBs is also substantially understated, compared to the amount that should have been collected.

In the last several years, Timken made several concerted efforts to obtain action on this issue from officials at Commerce and Customs. Regrettably, little progress was made. After a series of inter-agency accusations as to the party responsible for the problem, it became apparent that the matter could not be resolved by the means used up to that date. Instead, Timken had to consider other options to seek redress, none of which promised compensation for the harm already realized.

III. RECOMMENDATIONS

This report has shown that the system is not operating as Congress intended. The integrity of the system of antidumping laws is dependent upon the efficiency of the administrative agencies charged with their administration. On at least two occasions in the past, as highlighted in this report, Timken has suffered the effects of premature liquidation of entries subject to an outstanding order, before antidumping duties were levied. The problems faced by domestic industries stem from a failure by the Customs Service to correctly implement the Department of Commerce's antidumping and countervailing duty orders, the lack of coordination between the agencies and inadequate reporting requirements.

Both the Subcommittee on Oversight and the GAO have made recommendations for improving the system for assessment and collection of antidumping and countervailing duties. These proposals, while broad in nature, provide a building block for implementing concrete measures to correct existing problems in the system. In its report, dated February 8, 1990, the Subcommittee on Oversight made several general recommendations to improve the system including recommending that the Department of the Treasury should with the Department of Commerce outline specific responsibilities and duties for enforcement of antidumping and countervailing duty laws; the Department of Commerce should take steps to improve its working relationship with Customs and ensure Customs proper enforcement of orders by conducting rigorous reviews of customs data; and the U.S Customs Service should improve its method for collecting accurate data, implement an Automated Commercial System (ACS) module to "fully automate tracking and reporting of (AD/CVD) assessments and collections and upgrade the ACS processing of AD/CVD "entries to accommodate line item processing over the long term." Subcommittee on Oversight Report dated February 8, 1990 under Finding Number 13.

The GAO, in its report dated September 1989, recommended the following corrective measures:

1. The Secretary of the Treasury should direct the Commissioner of Customs to ensure that accurate reports are provided to Commerce...;

2. The Secretaries of Commerce and the Treasury should designate a team from their agencies to determine the feasibility of collecting additional data needed to review antidumping and countervailing duty settlements.

3. The Secretary of Commerce should establish procedures for using Customs' reports.

We are generally supportive of the Subcommittee's and GAO's recommendations and offer the following specific changes to ensure that the remedial objectives of the unfair trade laws are achieved.

1. Amend Section 520 [19 U.S.C. § 1520]

Section 520 should be amended to add the following new subsection:

(e) Reliquidation of entries to assess antidumping or countervailing duties. Notwithstanding section 1514(a), the appropriate Customs Officer shall reliquidate any entry necessary to correct the failure of the Customs Service to assess and collect an antidumping or countervailing duty properly assessed on such entry pursuant to section 736 [19 U.S.C. § 1673e(a)] or 706 [19 U.S.C. § 1671e(a)], but not assessed and collected in the initial liquidation; provided, that such reliquidation must occur within 18 months of the liquidation coming to the attention of the Commerce Department and an assessment rate pursuant to section 751 [19 U.S.C. § 1675] being established.

The proposed change would provide a third exception to section 514 (19 U.S.C. § 1514). Pursuant to section 514 reliquidation must occur within 90 days unless a protest is filed. Section 1520(c) currently provides only for reliquidation of entry for (1) clerical errors, mistake of fact, or other inadvertence, and (2) assessments of duty on household or personal effects.

2. Amend Current Documentation and Reporting Requirements

Customs should have a reliable system for tracking estimated antidumping or countervailing duties paid, outstanding duties owed and entries liquidated each month. It should also be the responsibility of the Department of Commerce to keep abreast of duties paid, duties still owed and entries liquidated each month. We therefore recommend the following changes to improve the tracking and reporting of antidumping and countervailing duties.

a). Documentation Requirements

At the time of entry of imported merchandise into U.S. territory, require importers whose merchandise is subject to a preliminary affirmative antidumping or countervailing duty determination to provide on the Customs entry form in the space next to the consumption entry number, the designation A/D or CVD so as to clearly mark which goods are subject to at least a preliminary determination of sales at less than fair value or to countervailable duties. In addition, as specified now in Customs Directive 3550-33 dated May 24, 1989, the importer entry clerk and imports specialist should be responsible for recording "directly below the HTS number, the appropriate antidumping/countervailing duty case number(s) as assigned by the Department of Commerce, International Trade Administration." CD 3550-33, at 16. At the Customs House, the entry clerk should review proffered entries to ensure that such designation has been made. Incorporate into the entry form a line for estimated duty rate to be entered on the computer and verified by the entry clerk. Require the import specialist in processing the entry for classification and appraisement to list on the duty summary the amount of duty to be assessed pursuant to a final affirmative determination in the annual review process by Commerce. After final determinations i.e., after publication of antidumping or countervailing duty orders and the final section 751 administrative review duty assessment rates, but before proceeding to liquidation of entries, the import specialist and the liquidator in the District Director's Customs office must confirm from the entry papers and the duty assessment summary the following information: ordinary duties payable, countervailable and antidumping estimated duty rates, estimated duties paid and balance if any owed.

b). Reporting Requirements

1). Monthly Port of Entry Reports: Require Customs officials at each port of entry to submit monthly computerized reports identifying by tariff classification the number of entries and the total volume (and value) of imports subject to antidumping and/or

countervailing duties, the ordinary duties paid, and the total cash deposits of antidumping and countervailing duties paid and the total of such duties to be paid. The report should also identify the total amount of entries liquidated. This report should be submitted to Customs Headquarters and to the office of Compliance at the Department.

2). ITA Summaries: Require the Department of Commerce after receiving the monthly reports from the port officials to prepare monthly summaries of the Customs report. The report should be made available to counsel for petitioners and other interested parties on the basis of an appropriate confidentiality agreement.

The changes proposed have many benefits including: (1) requiring detailed reporting regarding entries subject to antidumping or countervailing preliminary or final determinations causing discipline in Customs to pay closer attention to see that proper duties are assessed, (2) requiring Customs to review entries not liquidated for imports covered by preliminary dumping or countervailing duty determinations and (3) enabling counsel for domestic industry to monitor the extent to which the intent of this law for prompt collection and timely periodic assessment of first A/D and CVD duties is being carried out.

3. Amend Statute to Reinstitute Fiscal Responsibility for Negligent Acts of Customs Officers

In the 14 years since the issuance of the antidumping finding in tapered roller bearings, there have been several instances of negligent administration. Those officials at Customs responsible for authorizing premature liquidation have not been held liable for their acts of negligence which have resulted in uncollected duties. If the district director of customs were held personally liable for negligent acts committed under his command, there would be greater incentive on his or her part to utilize more care in the selection of the people in the field and in the management of those people.

Prior to the enactment of the Customs Administrative Act of 1890, an importer's remedy for inaccurate exactions was through an action directly against the collector. 21A Am Jur 2d, §73 (1981). The Customs Administrative Act of 1890, however, abolished the right of action against the collector in favor of a statute that exonerates the customs official for liability to any owner, importer, consignee, agent, or any other person for any on account of any decisions as to appraisement or classification of imported merchandise or duties charged thereon, or the collection of any dues, charges, or duties on such merchandise. Tariff Act of 1930, § 513 (1930), codified at 19 U.S.C.A. § 1513 (1980).

Although the customs official is a public official, he or she can be personally liable for unwarranted acts, and may be held personally liable for default or negligence in the performance of his or her duties. Dioguardi v. Durning, 139 F2d 774 (CA2 NY 1935). There are cases in which judgments have been rendered against collectors for taxes unlawfully collected and conversion of merchandise delivered to the wrong place. See Conklin v. Newton, 34 F.2d 612, 614 (CA2 1929) (listing such cases). While it is not the practice today to hold Customs officials personally liable for the negligence of his or her subordinates, he or she should be held liable if he or she is guilty of personal neglect, misfeasance or wrongdoing.

Presently, customs duties are not properly assessed or recorded. GAO Report dated September 1989 at 3. In 1987, Customs reviewed their system of tracking and reporting the assessment of antidumping and countervailing duties and discovered that 50% of the duties assessed were not accurately included in the 1987 report. Id. Customs and Commerce state that they are working to improve the tracking system, which should provide internal checks necessary to ensure accurate reporting. Id. at 18.

However, in a report prepared by GAO, dated February 1990, titled "Customs Automation: Duties and Other Collection Vulnerable to Fraud and Abuse," seemingly contradicts the notion that Customs and Commerce have made great gains in improving the accuracy of the reporting system. The GAO concludes that there are still internal control weakeness in the U.S. Customs Service's automated revenue collection and deposit processes

providing "an enormous potential for abuse and cover-up." GAO report at 3. The GAO study states that:

> Customs could be losing millions of dollars in duties and in other collections due to fraud and abuse because of an almost total breakdown of internal controls over its pre-numbered collection documents."

GAO Report at 2.

We therefore recommend as one method for ensuring a more reliable accounting of antidumping and countervailing duties, that the Customs Service once again be held accountable in a civil action by theinjured domestic industry for the full and proper collection of duties on merchandise subject ot antidumping or countervailing duties. The Customs Service should be liable for unwarranted acts such as negligence, and for all uncollected or improperly collected duties.

IV. CONCLUSION

As outlined in this report, the scope of the problem should not be underestimated. To ensure that the remedial statute is being effectively enforced it is necessary to amend the law to promote a greater degree of cooperation between the Customs Service and the Department of Commerce. In addition, in light of the profound enforcement problems, exemplified by Timken's experience, it is necessary to amend the law to provide for greater accountability and accuracy in the system.

Chairman GIBBONS. Mr. Mayer.

STATEMENT OF JOSEPH L. MAYER, PRESIDENT, COPPER & BRASS FABRICATORS COUNCIL, INC., AND JEFF BECKINGTON, COLLIER, SHANNON & SCOTT

Mr. MAYER. Mr. Chairman, I wish to thank you for the opportunity of presenting the story of the Customs Service in the U.S. imports of brass mill products.

I am Joe Mayer, president of the Copper & Brass Fabricators Council, a trade association consisting of 19 U.S. brass mill companies which together account for more than 80 percent of American production of brass mill products.

With me today is Jeff Beckington, a partner at Collier, Shannon, & Scott.

Brass mills supply metal in basic shapes which are essential to the three most important areas of our economy, building construction, motor vehicle manufacturing, and the electronic and electrical industries.

I base my remarks today on the council's experience over the past 5 years with 14 unfair trade cases, won by our members after time-consuming and expensive proceedings before the Department of Commerce, the International Trade Commission, and the courts.

In those cases our member companies were held to the most exacting standards by the agencies and the courts in the submission of our evidence and in fulfilling requests for additional data.

Our members took it for granted that after the rigors involved in winning these cases, the agencies charged by law with enforcing them would accomplish a minimum of two things.

First, the agencies would make sure that all products under dumping and countervailing duty order, identified by our Government as entering the United States, would pay the appropriate duty.

And, second, that steps would be taken by the agencies to ensure that all products under order were in fact identified as such.

As the report of the Oversight Subcommittee makes clear, neither assumption was remotely justified. Just to briefly update the Oversight Subcommittee report, in 1989 the Customs Service blue line report used to record dumping and countervailing duty collections did so on less than 15 percent of the brass sheet and strip entered from the nine countries under order as reported by the Bureau of the Census.

At the same time there is some progress to report. Customs personnel recently demonstrated for the council its current automated capability to track dumping and countervailing duty collections.

So far, Customs can track assessments on shipments entered for consumption and expects to add shipments entered into bonded warehouses in a matter of months.

Still uncertain is a date for completion of an automated module for tracking the actual liquidation of dumping and countervailing duties. That data is most important—a most important element—and must be included.

We believe that the Customs Service should be encouraged to increase the resources devoted to this project and that it should be completed before the end of 1990.

With respect to steps being taken by Customs to ensure all products under order are properly identified, I can report that customs representatives have advised the council that active steps are being undertaken for this purpose.

Whether these steps will be part of an ongoing program as we urge is unclear.

In concluding, I want to outline the council's proposals for legislation to assist in the correction of the shortcomings detailed by the Oversight Subcommittee.

First, Congress should require annual reports by the Department of Commerce on the amounts of dumping and countervailing duties that were assessed and collected by the Customs Service in each dumping and countervailing duty proceeding.

And, second, Congress should create a right of access for interested parties under administrative protective order to the internal Government records forming the basis of the report.

We are prepared now to submit legislative language to effect these proposals. We also intend to submit a proposal to correct a shortcoming which we have found seriously undermines the integrity of dumping and countervailing duty enforcement, namely reimbursement or absorption of duties.

This practice, which is widely used, is not being addressed by either Customs or the Department of Commerce.

Our proposal will ensure the dumping and countervailing duties are either paid by importers unrelated to exporters of the products or that absorption of duties by exporters or their U.S. subsidiaries is included in future dumping margins.

I thank you, Mr. Chairman.

[The statement of Mr. Mayer follows:]

STATEMENT BY JOSEPH L. MAYER
ON BEHALF OF THE COPPER & BRASS FABRICATORS COUNCIL, INC.

BEFORE THE SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON REPORT BY
THE SUBCOMMITTEE ON OVERSIGHT
REGARDING
THE COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

May 3, 1990

Good morning. I am Joseph L. Mayer, President of the Copper & Brass Fabricators Council, Inc. ("Council"), and it is my pleasure to appear before this Subcommittee today on behalf of the Council and our 18 member companies (see Appendix A for a list of the Council's members). The Council is a trade association that represents the principal copper and brass mills in the United States. These mills together generate over 80 percent of all semi-fabricated copper and brass mill products produced in the United States, including sheet, strip, plate, foil, bar, rod, and both plumbing and commercial tube. These products are employed in myriad applications, primarily in the automotive, construction, and electrical/electronic industries.

The Council's chief area of interest in this hearing concerns that part of the Oversight Subcommittee's report that deals with the Customs Service's enforcement of antidumping and countervailing duty orders issued by the Department of Commerce. Since early 1985, the Council and its members have brought a series of antidumping and countervailing duty cases that have successfully led to the issuance of eleven antidumping duty orders and three countervailing duty orders against imports of brass sheet and strip and of low-fuming brazing rod from a total of eleven countries. As you know, the Council has had the privilege of testifying about the enforcement of these orders on previous occasions, most recently before this Subcommittee in March 1989, and we appreciate the opportunity to appear again today with respect to this subject.

Based upon the Council's experience in its cases, the conclusion of the Oversight Subcommittee is warranted that Customs has done a poor job of enforcing the antidumping and countervailing duty laws. Not unreasonably, in resorting to these statutes to counter the injurious effects of large volumes of dumped and subsidized imports, the Council originally assumed that the Commerce Department as the administering authority, with Customs' assistance, would ensure assessment and collection of antidumping and countervailing duties and aggressively guard against unlawful avoidance of these extraordinary duties.

Instead, to its great dismay, the Council has discovered that these agencies' records are so incomplete and inaccurate that it is virtually impossible for anyone to ascertain whether and what duties have been paid. The Council has also found that the agencies have given a low priority to efforts to detect evasion of antidumping and countervailing duty orders through such means as improper transshipment, misclassification, and reimbursement of duties. Finally, the Council has been struck with the inability of the two agencies effectively to coordinate with each other in enforcement matters or to reach a consensus as to which agency is responsible for what tasks in this area.

In all of these respects, the Oversight Subcommittee's report has corroborated the Council's observations. As that report indicates, the so-called "blue-line" reporting process has been fraught with errors to the point of being unreliable and unused, is an administrative nightmare, and does not permit comparison of the amount of duty assessed with the amount actually collected by case, commodity, or country of origin. Moreover, the report substantiates that the agencies have not been aggressive in investigating possible circumvention of antidumping and countervailing duty orders and have not worked well together in carrying out their joint enforcement role.

Significantly, in the Council's understanding, the Commerce Department and Customs have either agreed with or not disputed these findings of the Oversight Subcommittee. Moreover, to their credit, the agencies have begun to implement some of the Oversight Subcommittee's recommendations to correct the deficiencies of the current system. Most notable in this regard are, first, Customs' undertakings to create an antidumping duty/countervailing duty module as part of the Automated Commercial System ("ACS") to replace the "blue-line" reports and, second, completion of a Memorandum of Understanding ("MOU") between Customs and the Commerce Department for the purpose of enhancing communications between the two agencies and timely, uniform enforcement in antidumping and countervailing duty proceedings.

Both the module and MOU are constructive measures that logically should improve the agencies' ability to collect the full, correct amount of antidumping and countervailing duties when they are due and owing. It remains to be seen, however, if the system will work well in practice. As has recently been explained to the Council by Customs, the module is not yet completed. The first part of the module dealing with entry data is almost in place, but it will apparently take another year or so before it will be possible for the module to generate a liquidation report with data at the all-important line-item level. Once that stage is reached, it will still be necessary for the two agencies to achieve and sustain a good working relationship under their MOU. In this last respect, the Council is encouraged that the MOU calls for formal consultations between Customs and the Commerce Department during May of each year and at any other mutually convenient time in order to discuss the MOU's effectiveness.

In general terms, therefore, the Council believes that progress is being made, but that considerable work lies ahead before the two agencies will be able to say with confidence that all appropriate antidumping and countervailing duties are being assessed and collected in accordance with orders promulgated by the Commerce Department. In addition, and as a corollary to this goal, the Council feels strongly that the agencies must act vigorously to expose and frustrate attempts to circumvent antidumping and countervailing duties through fraudulent means, such as transshipment, misclassification, and reimbursement of duties. In the past, neither Customs nor the Commerce Department seems to the Council to have been particularly active on this front.

In concluding my remarks today, I would like to suggest that enforcement of the antidumping and countervailing duty laws will be strengthened if the process is made more transparent and modified somewhat to allow limited participation by interested parties through their counsel, particularly the petitioning United States domestic industries' counsel. Two steps specifically recommend themselves.

First, the Council proposes that with Customs' assistance the Commerce Department as the administering authority publish annually a public report that summarizes for each antidumping and countervailing duty proceeding the bonds, cash deposits, and duties assessed and collected during the previous year. This report would represent a compilation of the data that are to be gathered by the module in the normal course of events.

Second, the Council proposes that interested parties' counsel be given access under administrative protective order ("APO") to the business proprietary information underlying the public report just mentioned. The APO procedure instituted in the Trade Agreements Act of 1979 has worked well but has been restricted to data submitted in conjunction with original investigations and administrative reviews. Extension of APO coverage to embrace enforcement data is natural and desirable, consistent with the congressional scheme to make these proceedings accessible to interested parties and with the fundamental task of collecting the correct amount of duty.

The Council is hopeful that these changes can be incorporated in the law and has recently submitted them to the Commerce Department and Customs for review. While the Commerce Department has not yet responded, Customs preliminarily has indicated its opinion that these proposals are feasible. In the Council's judgment, the annual public report and disclosure under APO of the subsidiary, confidential enforcement data would be of great value.

Once again, let me express my appreciation and that of the Copper & Brass Fabricators Council for this occasion to present our thoughts to this Subcommittee. We are grateful for the active interest you are taking in this area of enforcement of the antidumping and countervailing duty laws. I will be pleased to respond to any questions you might have.

APPENDIX A

MEMBERSHIP LIST

AMERICAN BRASS
70 Sayre St., P.O. Box 981
Buffalo, NY 14240
716/879-6700

CERRO COPPER PRODUCTS CO.
P.O. Box 66800
St. Louis, MO 63166
618/337-6000

CERRO METAL PRODUCTS
P.O. Box 388
Bellefonte, PA 16823
814/355-6200

CHASE BRASS & COPPER CO.
P.O. Box 39548
Solon, OH 44139
216/349-0200

CHICAGO EXTRUDED METALS CO.
1601 So. 54th Ave.
Cicero, IL 60650
312/656-7900

EXTRUDED METALS
302 Ashfield St.
Belding, MI 48809
616/794-1200

HALSTEAD INDUSTRIES, INC.
100 So. Elm St., Suite 400
Greensboro, NC 27401
919/272-1966

HEYCO METALS, INC.
Stinson Dr., RD 9160
Reading, PA 19605
215/926-4131

HUSSEY COPPER LTD.
Leetsdale, PA 15056
412/857-4200

THE MILLER COMPANY
99 Center St.
Meriden, CT 06450
203/235-4474

MUELLER BRASS COMPANY
1925 Lapeer Ave.
Port Huron, MI 48060
313/987-4000

NEW ENGLAND BRASS COMPANY
Taunton, MA 02780
508/824-5821

OLIN CORPORATION-BRASS GROUP
East Alton, IL 62024
618/258-2000

PLUME & ATWOOD
235 E. Main St.
Thomaston, CT 06787
203/283-4331

REVERE COPPER PRODUCTS, INC.
P.O. Box 300
Rome, NY 13440
315/338-2022

ULLRICH COPPER, INC.
2 Mark Rd.
Kenilworth, NJ 07033
201/688-9260

WATERBURY ROLLING MILLS, INC.
P.O. Box 550
Waterbury, CT 06720
203/754-0151

WESTERN RESERVE MANUFACTURING CO.
5311 West River Road, North
Lorain, OH 44055
216/277-1226

Copper & Brass Fabricators Council, Inc.

33-400 0 - 90 - 14

Chairman GIBBONS. Well, Mr. Mayer and Mr. Stewart, what you are telling us is disquieting and discomforting. I personally want to see that our laws are properly enforced. As I have said before, if we have got some bad ones let us talk about the bad ones and the ones that we have I think I want them properly enforced.

And you both made some detailed suggestions. I hope that you will follow them up with some more details if you feel that is necessary.

I want people who invest their time in getting an appropriate decision on countervailing and dumping to make sure that their victory is not a hollow victory and that it is followed up.

Because I think the laws, in order to be effective, have got to be properly enforced. And what you are telling me, in effect, is that you have a great deal of frustration if nothing else in trying to get your court decisions and appropriate administrative decisions enforced.

And that is not good government, it is not fair and I—we will seriously look at your suggestions and see what can be done to implement this.

Mr. Frenzel.

Mr. FRENZEL. Thank you, Mr. Chairman. I am grateful to both of the witnesses for their testimony. I note Mr. Stewart suggests the reliquidation being opened up another 6 months.

Can you explain why you chose that timeframe rather than the present one?

Mr. STEWART. Once the information has been determined that liquidations took place of merchandise subject to dumping duties without the collection of the dumping duties, when that information is presented to Customs, a period of time is required for Customs to verify for its own satisfaction that that has taken place and their administrative procedures for reliquidation normally contemplate up to a year for reliquidation to correct errors.

And for this reason I thought 18 months would be an appropriate period, Mr. Frenzel.

Mr. FRENZEL. Thank you very much. I notice also you suggest making customs officials personally liable for negligent acts committed by subordinates. I think it is a wonderful suggestion, it will save us a lot of money, and we will not have to hire any more district directors, but I assume you make the point to indicate to us that we ought to find ways to make sure that these officials are a little more diligent in carrying out their duties under the law.

Mr. STEWART. Yes, accountability of some sort.

Mr. FRENZEL. I thank you for that help and I thank Mr. Mayer as well and I yield the balance of my time.

Chairman GIBBONS. Well, this concludes our hearing for today and——

Mr. STEWART. Mr. Chairman.

Chairman GIBBONS. Yes, sir, go ahead, Mr. Stewart.

Mr. STEWART. May I submit a volume of documentation for the record, not to be printed in the printed hearings but for the study of your staff and it supports the testimony that I have presented.

Chairman GIBBONS. Well, we would like to have that. Your story about the tapered bearings is a shocking one. I know the problem

we had with just getting a decision in those cases and much less—then after that did not get in.

You mean to tell me there was no enforcement at all of those decisions?

Mr. STEWART. That is correct, Mr. Chairman.

Chairman GIBBONS. Well, that should not happen, it just should not happen. We are going to have to find a way to prevent that from happening. I would be personally interested in looking at that.

Thank you. I thank you very much.

Our hearings are concluded. We will keep the record open until May 11 for additions and we have got some questions coming back from the Treasury and I am going to give them a little more latitude on that and ask my staff to work with them so that we can, within a reasonable amount of time, get their responses in before we close the record.

And I want to again go on record as congratulating my colleague, Mr. Pickle, whom I asked to conduct this investigation of the Customs Service and I think he is—and his subcommittee and staff have exemplified the high degree of skill and dedication in conducting their investigation.

And we will take their recommendations and those of the witnesses seriously in trying to find some improvements.

As I announced earlier, it is my personal goal to try to get legislation through the House of Representatives before the recess this year for 1 week, generally called the August recess.

I think these things demand urgent attention and we are going to give them urgent attention.

Thank you very much for your cooperation.

[Whereupon, at 1 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

BEFORE THE
SUBCOMMITTEE ON TRADE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

COMMENTS OF STEPHEN A. ALTERMAN
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL
AIR FREIGHT ASSOCIATION

on the

COMMERCIAL AND TRADE OPERATIONS OF
THE U.S. CUSTOMS SERVICE

The members of the Air Freight Association appreciate the opportunity to comment on the Commercial and Trade Operations of the U.S. Customs Service generally and, the chance to make these comments and proposals in the context of the Pickle Report[1], which detailed several identified problems with the way in which the Customs Service operates in today's environment. Before dealing with specific problem areas and legislative suggestions, however, we would like to take this opportunity to describe our Association and its current relationship with the Customs Service.

The Air Freight Association is a nationwide trade organization made up of U.S. direct air carriers which operate all-cargo equipment, air freight forwarders and suppliers and consultants with ties to the all-cargo industry. A current membership list is attached hereto as Appendix A. To a very large extent, our members are directly responsible for the explosive growth in air cargo over the past decade -- both domestically and in international markets. In an attempt to quantify this growth, the Association last year sponsored a study of the industry entitled *The All-Cargo Air Carrier Industry: Its Economic Impact and Future Needs.*[2] This study revealed that:

- The industry's fixed assets at the end of 1987 were approximately $8 billion -- a 779.1% increase over 1977.
- All-cargo transportation revenues in 1987 were over $9 billion -- a 707.4% increase in 10 years.
- The all-cargo industry transported approximately 414 million shipments in 1987 -- a 1117.6% jump over 1977. At the same time, the tonnage carried increased 437.7%.
- The industry had over 10,000 full-time employees in 1987 -- a 482.8% increase over 1977.
- And the number of jet aircraft in use went from 59 to 372 in the same 10 year period.[3]

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[1] Report on Abuse and Mismanagement in U.S. Customs Service Commercial Operations, dated February 6, 1990.

[2] Prepared by the economic consulting firm of Leeper, Cambridge & Campbell of Alexandria, Virginia.

[3] Based on data submitted by Airborne Express, Burlington Air Express, CF Air Freight, DHL Worldwide Express, Emery Worldwide, Evergreen International Airlines, Federal Express, Flying Tigers Line, Southern Air Transport and United Parcel Service.

Of course, in the two calendar years since the data in the industry study, this growth has continued unabated and the figures today are even more dramatic. Moreover, in the past several years, much of the all-cargo industry expansion has come in international markets, thereby necessitating increased use of Customs facilities.

In order to meet the needs of the international shipping public, it is absolutely necessary that the all-cargo air carrier industry and the U.S. Customs Service work together to expedite processing while at the same time enabling the Customs Service to carry out its statutory missions. To this end, we are encouraged that the current administration led by Commissioner Carol Hallett and her senior staff has met with us and has agreed to continue working with us toward a more efficient cargo processing regime.

At the same time, there remain significant problems which need to be addressed by this Committee. Many of these concerns were detailed in the so-called Pickle Report submitted to the Oversight Committee. At this time, we would like to take the opportunity briefly to comment on several areas of concern to the all-cargo carriers:

Customs staffing is a continuing problem. In order to met the needs of the international shipping community, it is absolutely necessary that Customs have in place a sufficient staff to process the volume of cargo moving in international commerce. Moreover, this staff must be available when the shipments actually move, not when the Customs Service would like them to move. As a practical matter, in order to provide expedited service into the United States, it is necessary that Customs personnel be available 24 hours a day, not merely from 9 a.m. to 5 p.m. Since the industry is willing to pay for the provision of such service, there should be no problem in such increased staffing levels. Unfortunately, there is -- in spite of the fact that such added personnel will not increase the bottom line federal expenditures.[4] Accordingly, the Association respectfully recommends that any existing OMB-imposed personnel ceilings for both reimbursable and overtime positions be legislatively removed, providing that any extra positions be paid for directly by the users of such service.

In addition to staffing increases, there are several other legislative initiatives which could significantly improve Customs Service efficiency. For example, the Association strongly supports an increase in the value limit for informal entries from $1,250 to $2,500 and further urges that the limit for low value entries be increased from $5 to at least $100. Each of these proposals would have virtually no effect on the overall Customs Service mission while at the same time reducing the overburdened Customs staff.

In the next several years, we expect that the international operations of the members of the all-cargo air carrier industry will continue to expand dramatically; in order adequately to serve the international shipper who requires fast, reliable service, the Customs Service will be expected to be in a position to expedite the clearance of cargo and to insure that all applicable fees are collected. We urge this Committee to give the Customs Service the tools that it needs.

Thank you very much.

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[4]Members of the Air Freight Association already pay for Customs staffing at their express hubs either through the so-called Reimbursable Services Statute (31 U.S.C. Sec. 9701) or the Small Airport Statute (19 U.S.C. Sec. 58b). Association members further pay their fair share of Customs costs under the general use fee provision (19 U.S.C. Sec. 58c(a)).

APPENDIX A

AIR FREIGHT ASSOCIATION

COMPANY	CITY, STATE
Air Cargo Management Group	Seattle, WA
Air Courier Conference of America (ACCA)	Washington, D.C.
Air Express International	Darien, CT
Airborne Express	Seattle, WA
AIT Freight Systems, Inc.	Elk Grove, IL
Allentown-Bethlehem-Easton Airport	Lehigh Valley, PA
American Cargo Handling Equipment	Denver, CO
AMR Combs-Denver	Denver, CO
Arrow Airways, Inc.	Miami, FL
Aviall, Inc.	Dallas, TX
British Aerospace	Washington, D.C.
Bromon Aircraft Company	Alexandria, VA
Burlington Air Express	Irvine, CA
Colography Group	Roswell, GA
DHL Airways, Inc.	Redwood City, CA
Emery Worldwide, A CF Company	Palo Alto, CA
Evergreen International Airlines	McMinnville, OR
Express One International	Dallas, TX
Federal Express Corporation	Memphis, TN
FIDC/Fairbanks International Airport	Fairbanks, AK
Leeper, Cambridge & Campbell	Alexandria, VA
Mid Pacific Airlines	Indianapolis, IN
Northern Air Cargo	Anchorage, AK
Phillips 66	Bartlesville, OK
Profit/Lep	Marietta, GA
Rosenbalm Aviation	Ypsilanti, MI
Ryan International Airlines, Inc.	Wichita, KS
SMB Stage Lines, Inc.	Dallas, TX
Southern Air Transport	Miami, FL
Surf Air	Atlanta, GA
Transcontinental Airlines	Ypsilanti, MI
United Aviation Services, Inc.	Uniondale, NY
United Parcel Service	Louisville, KY

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ROBERT R. HENNESSY
Hamilton, Ontario
DENNIS E. JOHNSON
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May 11, 1990

The Honorable Sam Gibbons
Chairman
Subcommittee on Trade
House Ways and Means Committee
U.S. House of Representatives
1136 Longworth House Office Building
Washington, D.C. 20515

Re: AAPA Written Testimony on U.S. Customs Commercial Operations

Dear Chairman Gibbons:

The American Association of Port Authorities (AAPA) respectfully submits this statement for the record of the hearings held May 2-3, 1990. AAPA, founded in 1912, represents virtually all major public port authorities and agencies in the United States. AAPA members are public entities and mandated by law to serve public purposes, primarily the facilitation of waterborne commerce and the consequent generation of local and regional economic growth.

AAPA appreciated and supported the comprehensive review by the Ways and Means' Trade and Oversight Subcommittees of the commercial operations of the U.S. Customs Service. We believe that the prescribed recommendations should go far to alleviate the problems that were identified in the report. We also welcome the positive and cooperative spirit shown by our new Customs Commissioner, Carol Boyd Hallett. Recognizing previous problems, specifically in commercial operations, Mrs. Hallett is taking steps to enhance the productive working relationship between the trade community and Customs.

If trade volumes in the coming decade increase as expected, and fiscal and human resources continue to dwindle, Customs must have in place an automated system capable of handling the projected increases in volume, as well as the diverse types of cargo that move through our ports. Facilitating the use of automation within the Customs Service and the trade community should be the number one priority of any "modernization" legislation that this committee considers.

The Honorable Sam Gibbons
May 11, 1990
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In order to create a truly paperless environment, antiquated laws governing the Customs Service must be revised. First, and foremost is the elimination of the requirement to file paper manifests in addition to the electronic manifest. This creates an unnecessary administrative burden and massive volumes of needless paper. Additionally, the "marks and numbers" requirement must be addressed, either by eliminating the requirement, or augmenting the ACS system to include marks and numbers in the electronic manifest. AAPA would like to see marks and numbers as part of the electronic manifest, as they are useful to ports in properly identifying cargo. Likewise, it is necessary to provide for electronic signature. In sum, AAPA supports the passage of legislation which would modernize Customs operations through the recognition of the current realities of automation and paperless entries.

There are two additional areas AAPA would like the committee to consider. First, there should be comprehensive testing of any program changes to the Automation Commercial System (ACS). Given the important role of ACS in facilitating trade, it is critical that any changes to ACS are completely thought out and properly tested before being implemented. In the past, full consideration has not been given to programming changes in ACS, resulting in added expense for participants. For example, notice to implement a "bill of lading field replace" function was sent out by Customs Headquarters to all Automated Manifest System's (AMS) participants. However, after the notice was promulgated, a group of carriers voiced objection to the plan and Customs subsequentially shelved the project. For some AMS users, it was too late because they had already made costly programming changes to their system.

Second, priority must be given to ACS completion before other automated systems are undertaken. It is critical that the operational "kinks" are ironed out of ACS before Customs fully commits to the implementation of other automated systems, such as national entry processing. For example, several ports have had problems with the integrity of the manifest data downloaded from Customs. Ports, as well as brokers and carriers, have made large investments to participate in ACS. Completion of that system should be the number one priority before the Customs Service commits time, personnel and other limited resources to undertake other major projects and programs.

Thank you for the opportunity to express our views. We support the committee in its efforts to pass customs modernization legislation this year and offer our assistance to that end.

Sincerely,

Erik Stromberg

Erik Stromberg

American Electronics Association AEA

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TESTIMONY OF THE AMERICAN ELECTRONICS ASSOCIATION TO THE HOUSE WAYS AND MEANS SUBCOMMITTEE ON TRADE AND THE SUBCOMMITTEE ON OVERSIGHT ON THE SUBJECT OF COMMERCIAL AND TRADE OPERATIONS OF THE U.S. CUSTOMS SERVICE
Submitted May 11, 1990

The American Electronics Association (AEA) is a national trade association representing 3,000 U.S. electronics and information technology companies across the nation. AEA's fundamental purpose is to foster a healthy business environment for the U.S. electronics industry and to engage in activities that strengthen its competitive position in markets throughout the world.

A key area for the competitive position of electronics companies is the Customs area. AEA is dedicated in this area to encouraging a constructive relationship between the Customs Service and the industry which allows electronics companies to comply with import requirements in the most efficient manner possible. This is particularly important given the evolving technologies which characterize our industry and the increasingly complex nature of import requirements.

For many years, AEA member companies have used automation procedures to improve productivity. Automation has reduced paperwork, streamlined communication, eliminated redundant handling of data, and generally minimized company overhead. Indeed, automation has been the stuff and staple of our industry; it has been the basis of the Information Revolution.

We believe that automation efficiencies will yield the same benefits for government as they have for industry. U.S. Customs recognized this fact during the 1980s and, with the introduction of the Automated Commercial System (ACS), has lead the U.S. government in promoting automation techniques.

Nonetheless, Congressman Pickle's Oversight Subcommittee Report recommends ACS improvements in the areas of accounting controls, training of Customs officials, and reduction of private sector costs. We believe these findings are justified and should be used as a springboard for aggressively pursuing a national customs automation program which yields benefits for both importers and the Customs Service.

To this end, AEA believes that consideration should be given to transferring to qualified importers much of the detail now handled by Customs in processing import transactions. This would be contingent upon routine audits of importer records by Customs. Such a program would go a long way toward freeing up Customs resources.

AEA further supports the following general automation principles previously recommended in oral and written testimony by the Joint Industry Group:

- making automation techniques as non-intrusive as possible with respect to the normal flow of business operations and the privacy of corporate data banks.

- preventing discriminatory treatment. Non-users should not be penalized for their lack of participation in the program. In particular, Customs should avoid use of negative reinforcement to compel parties to use automation.

- allowing use of options and modules. Users should be able to select the modules they wish to use, based on a menu of options.

- accomplishing more efficient use of resources for both Customs and importers. The program should not be weighted in favor of either of these sectors.

- emphasizing the training of Customs field personnel and the business community to assure that information and guidelines regarding automation techniques are mutually understood. A program that provides importers with necessary training before the fact rather than after the fact, constitutes sound management. Moreover, this approach encourages compliance and improves the efficiency and effectiveness of Customs enforcement.

AEA also supports automation features recommended by the Joint Industry Group. These include:

- Electronic retention of all records in a centralized location for both importers and brokers.

- Use of electronic signatures in all facets of import transactions (release, entry summary, affidavits, etc.)

- Periodic Entry, as provided below:

  "To streamline the United States import entry process by presenting an import activity summary report to the U.S. Customs Service on a periodic basis, in lieu of presenting import entry documentation on an individual shipment basis."

  AEA believes that this program should, at minimum, be based upon a calendar month cycle. This is consonant with the periodic entry pilot along the Northern border and European period entry programs.

- Periodic payment of duties. AEA submits that such payment should be based on a minimum 30-day cycle as well.

- Implementation of electronic payment, one-stop quota processing, pre-approved release of low-risk shipments, filing of entry data in advance of shipment arrival, and uniform application of customs rulings and regulations.

Another feature strongly supported by AEA is remote filing of entries ("Triangle Processing"). This will allow importers to file entries at any Customs location irrespective of the port of entry or final destination. This will facilitate trade because it does not place geographic constraints on the handling of import data. Thus, a New York City importer that enters merchandise through San Francisco for inward movement to Kansas City can file data in "his own town." Remote filing should be implemented at the soonest feasible time.

CONCLUSION

Mr. Chairman, AEA is greatly pleased that Congressmen Frenzel and Pease have introduced a bill entitled "The Customs Informed Compliance and Automation Act of 1990" (H.R. 4689). We believe this bill will go a long way toward streamlining the import process. At the same time, we recommend that this bill incorporate the enhancements we have outlined above regarding period entry and implementation of remote filing.

Submitted by:

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STATEMENT OF THE AMERICAN PETROLEUM INSTITUTE
BEFORE THE
SUBCOMMITTEE ON TRADE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
FOR THE WRITTEN RECORD OF THE MAY 2 AND 3, 1990 HEARINGS
ON THE COMMERCIAL AND TRADE OPERATIONS OF THE U.S. CUSTOMS
SERVICE

The American Petroleum Institute (API) is a trade association which represents over 200 companies involved in all aspects of the petroleum industry. Because petroleum and its products are the largest single import item, API and its members have extensive contacts with the U.S. Customs Service (Customs). Consequently, API and its members have a direct interest in the quality, efficiency, optimal resource allocation, and responsive management of Customs' operations and procedures.

The hearings purport to review (1) the findings and recommendations of the Subcommittee on Oversight's Report on Abuses and Mismanagement in the U.S. Customs Service's Commercial Operations (the Report), and (2) various legislative proposals to modernize and reform Customs' trade operations. API would like to comment on I) Issues in Custom's Commercial Processing Services (relating to the Report) and II) Pending Legislative Proposals.

I. ISSUES IN CUSTOM'S COMMERCIAL PROCESSING SERVICES

As pointed out in the Report, as an unintended result of Customs' impressive efforts in narcotics interception, insufficient resources have been allocated to commercial processing services. This understaffing and underfunding (of necessary equipment and facilities) cause delays, administrative nightmares, and compliance problems.

A. Inconsistencies and Delays Upon Import

One of the adverse consequences of the apparent misallocation of Custom's resources are the delays in processing imports. Reports of import liquidations taking up to three years are not unusual.

Insufficient training (undeniably a costly effort) or lack of coordination (which admittedly is time consuming in itself) manifest themselves in inconsistencies in documentation requirements and accounting procedures: Commercial invoices or Form 4315 may be required, or not, depending on the particular port usance. Similarly, the accounting for Customs' User Fees and Harbor Maintenance Taxes differs among locations, with only a few allowing efficient quarterly netting of all fees.

B. The Drawback Program

Customs' duty drawback program enables exporters to receive a refund for a portion of the duties paid on imported materials if a product manufactured from these raw materials is exported. This encourages exports and makes domestic manufacturers more competitive in foreign markets.

Aside from the undue processing delays experienced by the petroleum industry (cf., similar observations by others referenced in Report, p. 10), there are two particular concerns with this program. The first is caused by C.S.D. 88-1 (June 1988) which, in disregard of established accounting methods, imposed unrealistic record keeping requirements; we expand on this issue in the context of the comments on pending legislation, infra. The other concern is a reduction of time limitations on drawback claims, proposed by Customs in the 1990 Drawback Revitalization Study (February 1990), hereafter referred to as the Study.

Under current rules, drawback (i.e., the complete or partial refund of the previously collected customs duty) is allowed if the manufactured article is exported within 5 years after import of the material designated to support the claim. (19 C.F.R. section 191.8.) The Study's proposal to reduce this period to 3 years would make drawback unavailable to secondary manufacturers, many of which are small petrochemical operations.

Under current industry practice, dedications of imports for secondary manufacture for export may take 3 years. The industry needs this time frame to maintain a sufficiently elastic drawback bank to stabilize the import/export fluctuations. It is the reduction of the import to export time frame to the currently operative "import to manufacture designation" period which would render drawback unavailable to the secondary manufacturer.

II. PENDING LEGISLATIVE PROPOSALS

A. The Ad Valorem Customs User Fee

API opposes the current 0.17 percent ad valorem customs user fee, imposed on imported goods under 19 U.S.C. section 58c(a)(10), enacted in P.L. 99-509. Designed as a user fee to reflect the rendered services and enacted with consideration of the U.S. obligations under the GATT, the fee was meant to be "limited in amount to the approximate cost of services rendered by the Customs Service". H.R. Rep. No. 927, 99th Cong. 2d Sess. 387, 389 (1986).

API continues to support the concept of federal user fees for beneficial and efficiently managed federal services; however, the user fee should be commensurate with the cost or value of the services rendered. Contrary to the enacting legislation's intent, in the case of bulk petroleum imports the current customs user fee is many times the cost of the service and, as such, is subsidizing other sectors of the inspection function of Customs.

Consider the typical size of crude oil cargos, ranging from 350,000 barrels to 1,000,000 barrels; at current crude prices, this results in a customs user fee of from $10,000 to $35,000 per vessel and entry. Compare this purported service and use compensation with the actual time required by a particular Customs official for witnessing and inspecting the bulk petroleum import: about four hours, in exceptional cases certainly no more than eight hours. Thus, the 0.17 percent ad valorem fee operates not only grossly inequitably in the case of an importer or purchaser of the crude oil, but has also been criticized by oil producing nations as a violation of the General Agreement on Tariffs and Trade (see Committee on Finance, U.S. Senate, New Release of 1-30, 1990).

Although imported cargos of finished products tend to be smaller than crude oil cargos, the value is higher and the same relative user fee inequity exists.

Section 4002 of H.R. 1594, as passed by the U.S. Senate, Cong. Rec. S 3056 of April 24, 1990, would place a ceiling of $550 on this ad valorem user fee. Similarly, H.R. 3150 of August 4, 1989, would have set the maximum at $575.

API and its members strongly support such a statutory ceiling on the ad valorem user fee because it would safeguard against a fee that is far in excess of the cost of the purportedly compensated use or service in case of particular entries.

B. Inventory Accounting for Drawback

Based on a lengthy review in 1960s, Customs allowed inventories of petroleum products for drawback purposes be kept 1) on a monthly (or with special approval, longer) basis, and 2) with product identification per tank farm or battery, rather than on an individual tank basis. In June of 1988 Customs issued Customs

Service Decision 88-1 (the Decision), requiring daily and per tank inventory accounting. Without prior notice and without any analysis, the Decision departs from a well established practice and imposes, with no apparent necessity, a regime that greatly restricts the ability of exporters of fungible goods, such as petroleum products, to file for drawback.

Petroleum products are manufactured in a continuous process where both duty paid and domestic raw materials may be consumed together in a continuous production stream. Furthermore, the nature of storage and transportation facilities results in commingling of identical products from different suppliers. The drawback statute itself, Section 313 of the Tariff Act of 1930, does not prescribe any particular method of identifying commingled materials. The procedures are a matter of administrative discretion by Customs.

In issuing the Decision, Customs seems to have exceeded its administrative discretion when it retroactively "reinterpreted" the procedures upon which - under the direction of Customs - industry had been basing its export program for products and filing drawback claims for commingled material.

The procedures outlined in the Decision reduce or eliminate the industry's ability to file drawback claims for fungible (commercially interchangeable) products, exported from common storage facilities. At such storage locations, including airport and naval port facilities, more than one company will have fungible products in storage.

In particular, at larger airports jet fuel is handled through common storage facilities, pipeline systems, and fueling facilities. In the typical case, unrelated service companies perform the actual refueling. The service companies maintain inventory accounting records, for each supplier or airline owning jet fuel, on a monthly and total airport facility basis. It is not feasible for refiners to maintain separate inventory accounting records for drawback-eligible product on a tank by tank basis without substantial costly changes in operations of U.S. airport facilities. The additional costs would outweigh the drawback refunds in most cases.

The Decision's requirements--to account for inventory on a daily and tank by tank basis--impose an excessive administrative burden, if not an impossible procedure. Exporters will not be able to file drawback claims for direct exports from commingled storage. This effectively eliminates the drawback option for jet fuel sold for use in international commerce at most major international airports nationwide, or for bunker fuel supplied to ships engaged in foreign commerce.

Any promotion of the duty drawback program has a favorable impact on foreign trade and the country's balance of payments. In recent years, sales of foreign refined bonded jet fuel (not subject to import duty) have increased dramatically. Available information indicates there are more than 1,000 daily foreign departures from the United States. Based on an average refueling of 18,000 gallons (about 430 barrels) before departure, these flights use jet fuel valued at approximately $8 million each day. Each barrel of domestically refined jet fuel that replaces a barrel of imported bonded jet fuel contributes to the reduction of the U.S. trade deficit.

Therefore, API strongly supports the proposed statutory resurrection of a rational and manageable drawback accounting for fungible goods in section 1713 of H.R. 1594, as passed by the U.S. Senate on April 24, 1990. The proposed amendment to section 313 of the Tariff Act of 1930 would reinstitute sensible monthly common storage inventory accounting. The definition of common storage would include jet fuel or naval fuel stored in tank farms at ports.

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STATEMENT OF GILBERT LEE SANDLER, ESQUIRE
COUNSEL TO THE CUSTOMS BOND COMMITTEE
OF THE AMERICAN SURETY ASSOCIATION
BEFORE THE SUBCOMMITTEE ON TRADE IN CONJUNCTION WITH THE
SUBCOMMITTEE ON OVERSIGHT, HOUSE COMMITTEE ON WAYS AND MEANS

May 11, 1990

Mr. Chairman, this written statement is filed on behalf of The American Surety Association (TASA) and its Customs Bond Committee. TASA represents 200 surety companies and agents. TASA members account for production of approximately 70% of all Customs bonds written annually throughout the United States. TASA members are therefore vitally interested in Customs' commercial operations and Customs relations with our surety industry.

The nation has relied upon surety bonds for more than a century to facilitate the flow of international commerce while securing the interests of the Government. As a matter of mechanics, the two basic functions of surety bonds are (1) to guarantee payment of duties and taxes and (2) to guarantee payment of liquidated damages where there has been a failure to comply any of a multitude of laws or regulations by importers, warehousemen, carriers, cartmen or other parties. As a matter of substance, there are many benefits realized by both the U.S. Customs Service and the import community through their reliance upon surety bonds.

First, bonds serve to expedite the clearance of goods. The U.S. Customs Service is able to release merchandise, often within a matter of hours, because the bond provides security that duties will be paid and the importer will comply with applicable Customs laws and regulations as well as with an estimated 400 laws under the jurisdiction of some 40 federal agencies. In addition, bonds ensure that revenue is protected, since the surety is obligated to pay where the importer or other obligee has defaulted. Further, sureties historically have played a vital role in Customs' collection activities. Customs today does not have a "Collections Department" mainly because unpaid duty bills or claims for liquidated damages are issued to the surety if the principal on the bond fails to pay. In numerous of instances every year, the surety's collection efforts induce the importer or other errant party to pay. In thousands of other instances, the surety makes payment to Customs and initiates its own reimbursement efforts against the bond principal.

The U.S. Customs Service also incurs some obligations as a result of its reliance upon corporate surety bonds. As the beneficiary to the surety contract, the Customs Service takes on the rights and obligations of a "creditor" as defined under the law of suretyship. Customs is therefore required to make demands and provide information to sureties in a timely fashion so that Customs does not materially prejudice the rights of a surety to verify or contest claims or seek redress against the bond principal. In fact, the Customs regulations currently provide for many of those obligations. For example, 19 C.F.R. § 159.12 provides for the issuance of liquidation extension notices to the surety, and 19 C.F.R. § 172.1 provides that sureties will receive notice and have the right to petition in liquidated damage cases. However, many other important obligations are left to ad hoc procedures or are not provided for at all.

We therefore strongly support the adoption of statutory and regulatory provisions in response to Findings 5 and 15 of the Oversight Committee. The Customs Service Automated Commercial System not only has serious flaws (Finding 5) but must be modified to intelligently integrate the surety system. Moreover, the Customs Service has not merely neglected its rights under the Customs surety bond procedure (Finding 15) but it has adopted procedures which impede its ability to efficiently enjoy the benefits of that program.

THE OVERSIGHT REPORT

The Oversight Committee essentially made two recommendations: make the Customs bond program more efficient and determine why Customs routinely issues untimely and inadequate notices to sureties. Both recommendations are ones which we fully support before this Committee, as we have before the Customs Service itself. We believe that implementation of those recommendations will require the actions described below.

1. CUSTOMS SHOULD IMPLEMENT AUTOMATED SURETY INTERFACE (ASI). TASA supports ASI and urges its early implementation and integration into the ACS system. We believe that ASI will significantly reduce problems currently encountered by Customs and sureties.

As Customs moves into a "paperless environment", it must develop a sufficient means to electronically communicate with sureties. The benefits to the importing community as well as to Customs and the sureties are obvious. A direct computer link can assure that the sureties will receive information which is timely, complete, accurate and verifiable, both at the time the bond is undertaken and at the time Customs makes demand or gives notice of a default. A shared computerized data base will eliminate the need that the surety seek basic paperwork or other information from Customs, bond principals or their brokers. The settlement of bills and liquidated damages will be enormously expedited by the shared data base. Sureties will be able to better protect the revenues and other obligations to the United States by having the information needed to make intelligent underwriting decisions and to set aside appropriate amounts of reserves for future losses.

ASI would accomplish these purposes by providing the surety with an accurate identification of each obligation covered by its bond at the time the obligation is incurred. Thereafter it would track the information in the ACS module, permitting the surety to know that exposure no longer exists (e.g. entries are liquidated, protests or petitions are decided) or that exposure has increased (liquidation has been extended, suspended, redelivery notices or liquidated damage notices have been issued). The ability of the surety to accept or reject new bonds, or to cancel or renew old ones will be greatly enhanced. This will result in diminution of "bond deficiency" situations, i.e., circumstances in which Customs Service demands on a bankrupt principal exceed the bond liability limit.

2. THE CUSTOMS SURETY BOND SYSTEM OR ITS KEY ELEMENTS SHOULD BE CODIFIED. First, we strongly recommend codification of the customs bond system. Bonding is required by statute in only three instances, even though Customs bonds have been used for over one hundred years. The Secretary of the Treasury is empowered by the Congress to require bonds "in any case in which bond or other security is not required by law" (19 U.S.C. §1623). As previously discussed, the use of surety bonds has enabled the U.S. Customs Service to protect the revenue and insure compliance with federal regulations while keeping the Governments' administrative costs relatively low. The Congress should enact legislation to codify the existing practice and require bonds on all Customs transactions except those transactions for which bonds are not currently required by regulation.

Alternatively, the procedures most crucial to an effective surety program, should be codified. Among those procedures are the following:

a) Notice of liquidation should be provided to the surety as well as to the importer or broker. While this notification currently consists of a physical notice posted in the Customshouse for the general public, it is our understanding that Customs intends to move to an electronic notice procedure directly communicated to the concerned parties. The surety is such a party.

b) The U.S. Customs Service should be required to retain certain basic information and evidence (whether in the form of physical documents or electronic data) necessary for administrative and judicial review. Under current law, in order to succeed in a collection action in the appropriate court, the U.S. Customs Service has the burden to establish the existence and amount of the debt and the obligation of the party from whom payment is sought. Also under existing law, the Customs Service is required to forward to the United States Court of International Trade in connection with any protest the basic documents reflecting the transactions and the decisions of the Customs Service which have been contested. We recognize that shifting rules for recordkeeping and the development of electronic entry processing may modify the areas in which the Courts (or importers, brokers or sureties) may properly rely upon the Government for evidence. Nonetheless, there is a threshold which must remain with the Government and the Congress should make certain that the threshold is defined and followed.

c) The surety should be guaranteed access to evidence necessary to verify claims. A surety seeking to verify a demand made upon it must rely upon the information in its possession or in the possession of the importer, its broker or Customs. Under current procedures, the information available to the surety is minimal; if ASI is fully implemented and integrated with ACS, much of the needed information will be available from the surety's own files.

Whether or not the surety's records are made more comprehensive by ASI, there will still remain many situations in which the surety must obtain information concerning the transactions, and Customs Service decision-making, from files it does not control. Under current procedures, the Customs regulations and bond (the text of which was written by Customs and adapted in a rule-making procedure, but which principally incorporates Customs regulations) do not require importers or brokers to provide documents or information to the surety. As a third-party recordkeeper, brokers often are reluctant to release documents. Statutes and regulations should direct the importer and broker to provide such needed information to a surety having received a demand on its bond. In addition, the Customs Service now generally shares information with the surety only in response to formal requests under the Freedom Of Information Act. This cumbersome and costly process could be avoided by adopting statutes and regulations requiring Customs to disclose specifically defined information necessary to the handling of demands on surety bonds.

It has been the experience of TASA members that document retrieval via the Freedom of Information Act is a costly and time-consuming effort for both the government and the requester. For example, in a recent instance, the U.S. Customs Service took over one year to respond to a request for information made under the Freedom of Information Act. While we agree with the Subcommittee's recommendation that the U.S. Customs Service should study why it is unable to routinely issue adequate notices to sureties under customs bonds, we believe the problems should be addressed by amending the Customs regulations to clearly specify that documentation must be made available to the sureties upon request.

CUSTOMS MODERNIZATION PROPOSALS

TASA supports Customs' efforts to modernize its legislative structure. We are concerned however that only a brief summary of the Act has been made available to the public. We have reviewed the synopsis of Customs' modernization proposals and would like to discuss several of the changes being recommended by the Customs Service, each of which has particular significance to the ability of Customs to gain the full advantage of the surety bond program.

1. REDUCE LIQUIDATION PERIOD TO THREE YEARS. With respect to liquidation, Customs has proposed to reduce the total liquidation time from four years to three years, and remove the

"administrative burden" of processing yearly extensions. While this proposal appears to be an effort to streamline the liquidation process, we are concerned that this suggestion is an effort to eliminate the timely decision-making that the Congress intended from Customs. For example, during hearings on the Customs Procedural Reform Act of 1977, the Congress heard testimony from the Commissioner of Customs on the benefits of placing a one-year time limit on the liquidation period, with extensions for specified reasons. As testified to by the Honorable Robert E. Chasen, Commissioner of Customs:

> The liquidation period can be extended by the Secretary for specified reasons upon giving notice to the importer. This provision would be beneficial to both Customs and to the importer. It would eliminate unanticipated requests by Customs for additional duties and protect surety companies against losses resulting from dissolution of their principals where there have been undue delays by Customs.

The surety is a key party to the entry transaction from the moment a bond is executed with a substantial interest in knowing whether its obligations have been the subject of activity which extends or increases the likelihood that a demand will be made. This proposal thereby increases the surety's potential liabilities with respect to losses resulting from dissolution of their principals in instances where there have been undue delays in liquidation.

2. VOLUNTARY RELIQUIDATION. Customs has proposed to extend the period for voluntary reliquidations, to one year from the date of liquidation. We believe that this proposal has immense ramifications both on the ability of Customs to seek increased duties and to request redelivery.

This provision injects uncertainty into the importation process which the Congress specifically wanted to avoid. Congressional intent on this issue is evident in the addition of a new Section 504 to the Tariff Act of 1930, as amended, which limited the time period for liquidations to one year. This provision was intended to eliminate unanticipated requests by the Government for additional duties and to protect sureties against losses resulting from dissolution from their principals where there was undue delay in liquidation. With the addition of Section 504 to the Tariff Act, importers and their sureties were able to determine within a certain time their final duty liabilities. Customs' proposal would mean that long after goods are sold, duty liability could increase. Adjustments in sales prices to reflect increased duty assessments would be impossible.

This proposal also causes serious problems with respect to the issuance of redelivery notices. Increasing the time period for voluntary reliquidation by the Government to one year after liquidation also expands the time within which the government may demand redelivery of cargo. It will be impossible for importers to redeliver goods that have long been released into the stream of commerce. Consequently it will be the importer and its surety who will be liable for liquidated damages for the failure to redeliver. This proposal increases the surety's potential risks enormously because liquidated damages for the failure to redeliver are assessed in an amount equal to the value of the goods.

3. TIME FOR FILING PROTESTS. Customs proposes to amend Section 514 of the Tariff Act of 1930, as amended, to provide that a protest must be made within one year after notice of liquidation or reliquidation. Current law provides that a protest must be made within ninety days after notice of liquidation or reliquidation. TASA believes that there are substantial benefits to be gained from retaining the ninety day time limit on filing protests. We therefore strongly favor deletion of this provision from Customs' proposal.

As previously discussed, the surety's risk of loss increases with the passage of time due to business failures and document loss. The Government also experiences difficulties when an unduly long time passes between liquidation and protest. Import specialists knowledgeable on the issues of a particular entry are no longer available and important documentation such as the liquidation worksheet gets lost. In addition, as discussed above, we believe that an increased protest period inappropriately invites the Government to extend the time for issuing redelivery notices and imposing liquidated damages, instead of enforcing the applicable law in a timely fashion. In short, there are virtually no benefits to the involved parties in extending the protest period to one year.

4. PROTESTS. We believe that protests should be deemed approved if not acted upon within one year of filing. The law currently provides that Customs has two years to act on a protest, but does not provide any consequence where there is a failure to meet the deadline. Customs is able to decide the vast majority of protests within one year. In practice, most can be decided within a few weeks. The surety's risk of loss escalates with the passage of time due to business failures and document loss. In addition, importers are hurt by unreasonable protest review periods because refunds of duties to which they are entitled are delayed, access to judicial review is delayed, and companies are unable to determine the costs associated with their present business practices. The government also experiences problems when the protest review period is excessively long. Backlogs accumulate and employees with knowledge of a particular entry are no longer available. We believe that the statute should require that protests be approved or denied within one year. If Customs fails to act within one year, the protest should be deemed approved.

5. LIQUIDATED DAMAGE PROCEDURES SHOULD BE STREAMLINED. A part of the inefficiency of the Customs Service in handling liquidated damage cases is the absence of a coherent administrative scheme for the handling of such cases. The Courts are currently divided on the issues of whether or not liquidated damage cases are protestable or only subject to an administrative petition. If both a thirty-day petition and ninety-day protest are fileable there can be no certainty as to when the debt becomes final, due and owing. The Customs Service has institutionalized the confusion by adopting regulations which provide for a petition within thirty-days, while instructing its field offices to hold liquidated damage cases open for ninety-days and to await the protest period. The notice issued in individual cases to importers advises of the thirty-day period to petition; there is no mention of any a ninety-day protest period.

In addition, the law currently does not provide a procedure for a party to pay mitigated liquidated damages and seek judicial review. Since liquidated damages are normally assessed at the value of merchandise and then mitigated to a small percentage, it would be rare for a party to pay liquidated damages in order to contest a denied protest in the Court of International Trade. The economic risk is too high. Liquidated damages ought to be patterned after the Congressional modification of Section 592: establish an administrative procedure which culminates in a reasoned decision in an amount reflecting the nature of the violation, degree of culpability or measure of damages to the Government. That decision is one which should and will either be complied with or contested in Court.

We appreciate the opportunity to offer these comments and will be pleased to work directly with the Committee and its staff in further developing any additional information and proposed legislation as the Committee continues its important work.

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STATEMENT OF CHARLES V. BREMER, DIRECTOR, INTERNATIONAL TRADE DIVISION, AMERICAN TEXTILE MANUFACTURERS INSTITUTE

This statement is submitted on behalf of the of the member firms of the American Textile Manufacturers Institute (ATMI). ATMI is the national trade association for the domestic textile industry. ATMI's member companies operate in more than 30 states and account for approximately 75 percent of all textile fibers consumed by mills in the U.S. Its members are engaged in every phase of textile manufacturing, processing and marketing. The industry currently employs 711,000 workers, all of whom are affected by the subject of the Subcommittee on Trade's review of the commercial operation of the Customs Service of the United States.

The spectacular growth of imports of textiles and apparel has had a dramatic effect on the American textile industry and its workers. During 1989, these imports totalled 12.1 billion square meters equivalent, up 5 percent over the previous record of 11.5 billion square meters set in 1987. The value of these imports was over $32 billion and the resulting trade deficit exceeded twenty-six billion dollars. Much of these imports entered into our market in violation of U.S. law and the international agreement which governs worldwide trade in textiles and the United States' many bilateral textile trade agreements.

The United States textile and apparel import control program exists in law and in regulation and exporters in foreign countries and their American customers are obliged to adhere to these laws and regulations. The United States Customs service plays a crucial role as America's first line of defense in preventing illegal or fraudulent imports and the economic harm they may cause. ATMI and the entire textile industry have the greatest regard and appreciation for Customs' efforts in this area. We recognize that Customs' task in enforcing the terms and conditions of the 40 bilateral textile agreements is a nearly impossible one, a problem accentuated by the fact that there are over 150 countries shipping merchandise in 147 product categories. It is an undeniable fact that with over 950,000 separate entries through 274 ports, the Customs Service resources are strained. But, ATMI believes that the solution is to devote more human resources to the problem by adding qualified and trained inspectors, special agents, import specialists and auditors to monitor the flow of textiles and apparel into the United States. It would be a major error to solve the problems of an over-burdened Custom Service by reducing the number of inspectors or allowing an increase in the number of paperless entries. This is especially true given the sensitivity of the domestic textile and apparel industry to imports as well as the fact that textile and apparel imports are governed by special rules and agreements.

The use of the paperless entry procedure for textile and apparel imports is dangerous to the economic health of the domestic industry and does not bode well for the import control program specifically designed for textiles and apparel. A system of paperless entry essentially allows the automated manifest system to interface with the automated broker system and the automated visa verification system. If these three computers agree that there are no apparent problems with the shipment, then the shipment is automatically cleared through Customs and enters the economy. Ten days later, a Customs official receives a printout and only at that point does a human review of the particular transaction take place. By this point, the goods are a part of the economy and any potential leverage that Customs officials may have had has been eliminated. The damage to one of America's basic industries will have already occurred. In an ideal world, paperless entry would be the ideal system. Unfortunately, as has been seen in the past, the import of textiles and apparel is fraught with fraud. Therefore, the paperless entry system cannot and should not be used to monitor textile and apparel shipments.

Regardless of the checks which are built into the system, whether they be to check first-time importers, importers of a certain product, importers of products from a certain country, imports by a certain company or a random check, nothing will ever replace the intuition or "gut feeling" of a highly-trained and well-qualified Customs agent, inspector or import specialist. Not only will intuition, a key attribute of any front-line Customs

official, serve the import control program well, the mere presence of a human being taking tickets at the gate to America can only serve as a deterrent to the turnstile jumpers who will now have to think twice before fraudulently importing textiles and apparel and getting a free ride on the American economy. Intuition inspired selectivity as a basis for inspection of textile and apparel shipments has always served the Customs Service well. A move to paperless entry for textile and apparel products and a simultaneous reduction in the human interventions by individuals with expertise in a specific commodity area is an open invitation to increased fraud.

As traditional country suppliers have filled their quota allocations and are limited by the bilateral agreement as to other products that they can ship, the inevitable search for other countries which can serve as new suppliers of particular products has begun. This movement to new suppliers by investors from traditional supplier countries has raised the potential for abuse of the textile and apparel import control program via fraud and transshipment. For example, in 1987 imports had reached a record level of 11.5 billion square meters equivalent (SME). Because many of the traditional supplier countries from the Indian sub-continent and Pacific Rim filled their quotas, the search was on for new sources of particular products. The United Arab Emirates, with its open investment policy and an abundant supply of third world labor which had been imported to work in the oil-boom economy, was the perfect country to serve as a new supplier. In just a single year, imports of apparel went from 4 million SME to 24 million SME. By the admission of the representatives of the government of the United Arab Emirates, not all of these products had their origin in the Emirates. A majority of the early shipments and a large number of the later ones, had their origin elsewhere. Before Customs could do anything to head off this illegal surge of garments, the products had already entered the economy. Today, the shipments of apparel from the United Arab Emirates has reached 32 million SME. But, the problem has not abated. As the Emirates have begun to exhaust their quotas, and actually embargo on several product categories, imports of these exact same products from the neighboring Gulf States of Bahrain, Qatar and Oman have begun to rise rapidly. Perhaps this is mere coincidence. Perhaps this is a new surge in investment for these oil-rich, people-poor countries. More likely though, it is fraud. The illegal transshipment of goods from the Mideast has become a severe problem to the domestic textile and apparel industry. Customs must implement procedures to deal with this problem.

The Customs Service, with the support of the entire U.S. government, should have the ability and resources available to it to conduct on-site inspections of foreign production facilities (with the agreement of the foreign government) in order to ascertain whether actual production is taking place in a given location. The Customs Service already has highly-trained personnel who are capable of investigating these situations. What they need is the resources and the mandate to do the preventive maintenance necessary to protect the domestic economy from fraud and transshipment. Such a procedure, done only when there is an apparent egregious violation of textile and apparel import regulations or bilateral agreements, will also serve as a deterrent to those individuals or companies contemplating similar action.

The United States must provide the Customs Service with the resources and mandate necessary to implement an effective textile and apparel import control program. But, the Customs Service must help itself in designing a commercial operations policy which recognizes the reality of the prevalence of fraudulent trade in textiles and apparel. On August 11, 1989, the Customs Service issued a directive, Number 4400-10 regarding the policy of seizures for certain importations made contrary to law. It discussed the alternatives to seizure as a remedy and narrowly defined when Customs personnel could make immediate seizures. Customs policy allows for the immediate seizure for very serious violations such as those affecting health and safety, importations bearing counterfeit trademarks, piratical copies of copyrighted material, imported merchandise bearing false designations of "United States" as the country of origin, or merchandise imported with counterfeit visas. The directive fails to enumerate such practices as products imported under a country of origin label other than the true source of the product for the purpose of quota evasion. For example, a garment of Indian origin

with a label "Made in Bahrain" would not meet the Customs directive guidelines for immediate seizure despite the fact that it is a blatant and obvious violation of United States law. For Customs to merely deny entry as the policy directive states, could have a deleterious effect on U.S. commerce. The importer could take these goods and look for a port with a Customs official who may not be as diligent, a common practice referred to as "port-shopping" or the importer could take the goods and dump them in a third market, thereby displacing similar U.S. exports to that market. In either case, Customs failure to seize these fraudulently shipped goods has and will have had a negative impact on the United States textile and apparel industry.

Ever since the first textile quotas were implemented in 1937, the United States government has acknowledged that imports under quota require special attention. In this day and age, when employment in the textile mill sector is at its lowest level since December, 1986 and apparel employment is at its lowest level in recorded history, the Customs Service needs to be equipped and prepared to prevent an even more precipitous decline in jobs which could occur as a result of fraud and transshipment. It must use its highly-trained personnel and not just computers to prevent the abuse of the textile and apparel import control program. The Customs service must use these same personnel to visit sources suspected of shipping or transshipping fraudulent merchandise. And, it must undertake an effort to examine its own policies to ensure that they are in the best interest of its own mission as well as in the interest of the domestic industry and workers that the rules were designed to protect.

CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION

WRITTEN STATEMENT ON BEHALF OF CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION BEFORE THE SUBCOMMITTEE ON TRADE PRESENTED BY PATRICK D. GILL, CHAIRMAN, ADMINISTRATIVE PRACTICE COMMITTEE

This statement is submitted on behalf of the Customs and International Trade Bar Association (CITBA) in conjunction with the hearings of the Subcommittee on Trade which were held on May 2 and May 3, 1990. CITBA is composed of attorneys in private practice and government service, who are located throughout the United States and who devote a substantial part of their practice to Customs law. The members are vitally interested in the operations of the Customs Service and regularly practice before Customs representing all segments of the international trade community, including importers, exporters, and domestic manufacturers. CITBA welcomes the opportunity to present a written statement with respect to the matters under review at the hearings.

Our ability to provide the Subcommittee with a complete and detailed comment and analysis on all the important matters before it is severely restricted by two factors: the absence of a specific legislative proposal from the Customs Service and the short public notice announcing this hearing. The specific proposals which this Subcommittee will ultimately consider are ones which cannot be fully understood or assessed until the Subcommittee has had the benefit of hearing the considered reactions of the many parties who will be impacted by those proposals. Those parties include importers and exporters, the brokerage and surety community, United States manufacturers, federal agencies and the federal Courts as well as practitioners of Customs law. We urge that the Subcommittee hold further hearings on the various subjects and important issues raised both by the Oversight Subcommittee and by any proposed legislation for modernization and reform. CITBA would welcome the opportunity to work with Subcommittee staff members in the future to discuss and analyze the Oversight Subcommittee findings. In fact, since drafting these comments, we have learned of the very recent introduction by Congressmen Pease and Frenzel of H.R. 4689 which our association's committees will study and be pleased to comment on at an early date.

The first of two matters on the Subcommittee's agenda was a review of the findings and recommendations resulting from the Subcommittee on Oversight's investigation of Customs' commercial operations (WMCP: 101-22). CITBA is in general agreement with the findings of the Oversight Subcommittee and applauds the detailed and painstaking investigation which led to those findings. Our association appeared at the hearings of the Oversight Subcommittee and a number of our recommendations and comments are reflected in the Subcommittee's findings. We urge this Subcommittee to act in response to the recommendations of the Oversight Subcommittee with regard to the overall operations and management of the Customs Service. The serious deficiencies uncovered by the Oversight Subcommittee need to be remedied as soon as is possible. Among the concerns registered by CITBA before the Oversight Subcommittee were excessive preoccupation with enforcement efforts against commercial shipments at the expense of service to the legitimate needs of the trade community; an undermining of the voluntary disclosure provisions of 19 U.S.C. 1592 which has discouraged voluntary compliance by importers; redefinition by regulation of amendments to the civil penalty provisions enacted by Congress in the Customs

Procedural Reform and Simplification Act of 1978, P.L. 95-410, 92 Stat. 888; abuse of the seizure provisions of 19 U.S.C. 1595a(c) and a pressing need for amendment of that provision; general deterioration in service to the trade community resulting from cutbacks in personnel and insufficient funding; and the implementation of far reaching changes in the area of automation without sufficient interaction with all segments of the trade community regarding the impact of these changes.

CITBA has been heartened by some of the public pronouncements and apparent policy changes which have been initiated by the new Commissioner of Customs, Carol Hallett. However, we believe that the Customs Service has a long way to go before the abuses and deficiencies of the past several years will be remedied.

The second purpose of the Subcommittee hearings was to review various legislative proposals to modernize and reform Customs' trade operations. In the absence of specific draft legislation and/or actual legislative proposals in the form of bills which have been introduced, CITBA can only provide the Subcommittee with general observations. As to the "Proposed Customs Modernization Synopsis," our primary comment is that the proposals lack sufficient detail and in many cases are disturbingly ambiguous. However, we wish to focus on a few examples of proposals contained in the synopsis to demonstrate our deep concern with the substance of the proposals and the way in which they are being presented.

CITBA is opposed to the proposal to extend the statute of limitations to provide that the issuance of a Prepenalty Notice extends the statute for two years. We believe that the safeguards envisaged by the statute of limitations would be seriously undermined, if not eliminated, by the proposed automatic two-year extension of the statute. Such an automatic extension would be a strong disincentive for Customs to conclude the penalty cases in a timely fashion. The prepenalty notice procedure was enacted by Congress in the Customs Procedural Reform and Simplification Act of 1978, supra, to protect importers from being subjected to the harm which can result from the mere commencement of a baseless penalty case. The statute of limitations protects importers from the dilatory commencement of an action as to which a defense is rendered difficult or impossible merely because of the passage of time. Customs' proposal to use the prepenalty procedure as a vehicle to extend (and erode) the statute of limitations would result in the combined use of two statutory provisions intended to protect importers in a manner that actually fosters dilatory action by Customs to the detriment of importers. This was not the intention of Congress.

Furthermore, the five year statute of limitations coincides with the five year recordkeeping requirement. Routine extensions of time for Customs to act on penalty cases may seriously prejudice the rights of importers against whom penalty cases are asserted, especially when information relevant to the disposition of the case is stored on electronic data, which may be lost forever after the five year recordkeeping period has expired. Instead of creating a convenient vehicle for automatically extending the statute of limitations, Customs should be encouraged to act more promptly on these cases rather than disposing of them at the last possible minute. We would also point out that while Customs seeks to extend the time for considering (or sitting on) these cases, it continues to cut down the time periods for importers to respond to Prepenalty Notices, Penalty Notices, Liquidated Damage Claims, and other demands made against importers.

CITBA is opposed to the proposal to reduce the period for exporting under manufacturing drawback from five to three years. Recent studies by Customs itself have acknowledged past problems in promoting the drawback program. Rather than reducing the time required to export under manufacturing drawback, Congress should consider extending these time limits. Such a change would assist in the future promotion of the drawback program and serve to redress neglect of this program.

We are opposed to the Customs proposal which would permit voluntary reliquidation within one year from the date of liquidation. An express purpose of the Customs Procedural Reform and Simplification Act of 1978, supra, was to give finality of liquidations which occur automatically within one year of entry. This proposal would directly undermine that Congressional policy.

CITBA is also opposed to the proposal to reduce to three months the period in which title to merchandise in General Order (G.O.) would vest in the United States. This period is unreasonably short and fails to take into account practical considerations where disputes exist among parties as to the disposition of merchandise. The present period should be retained.

While it is not possible to comment on all of the specific proposals under consideration and additional proposals which our association believes should be considered, we would be remiss if we did not comment generally on the subject of electronic processing, which continues to be a priority item on Customs' agenda. CITBA supports the overall goal of automation to the extent that it seeks to eliminate the current paperwork burden and to make importing more manageable for both the Customs Service and the trade community. However, as the Oversight Subcommittee noted, many changes are being implemented without sufficient study and comment as to their impact. CITBA believes that safeguards must be in place to ensure that the legal rights of the importing and exporting community are not endangered.

The United States Customs Service during the 1980's has embarked on a course of automation with the ultimate, stated goal being the "paperless entry." CITBA wishes to express its concern that the accomplishment of such goal not, in any way, jeopardize the statutory rights provided to the international trade community. Although the United States Customs Service has been working with many private sector groups (i.e., Customs brokers associations, transportation associations, and individual importers), the focus seems to be directed primarily to matters of operational efficiency, with little concentration on the concurrent need to ensure that legal rights or remedies heretofore protected or established by documentary evidence are maintained in the process. As a bar association whose individual members are involved in the representation of parties engaged in international trade, we are viewing the Customs Service move to automation from the perspective of the preservation of the legal rights of the international trade community.

For instance, when the Customs Service fully implements the "paperless entry" how will an importer be notified that the Customs Service disagrees with the tariff classification provision under which a certain imported article was entered? The importing community must continue to be advised of how its merchandise is appraised and classified and how and when said merchandise is finally liquidated. Without such information, an importer will not be in a position to exercise its statutory right to protest a Customs decision with which it disagrees.

A question which necessarily arises with a "paperless entry" system is the documentation which must be furnished to the United States Court of International Trade upon the filing of a summons by an importer. Since there will be no "entry jacket" maintained by the Customs Service, how will the Court receive the information regarding the merchandise and in what form will said information be provided? Will Customs impose an additional burden and expense on the importer to recreate the Customs record in order for the importer to exercise its basic right of judicial review?

With the move toward automation and the "paperless entry," the Customs Service is attempting to meet its objective and the objective of the importing community to move merchandise through the Customs process in an expeditious manner with the least amount of expense. The objective of CITBA is to ensure that such a goal is accomplished without jeopardizing the rights of the trade community, rights which may be overlooked by the trade community itself.

For this reason, Customs must endeavor to consult with a broader public as it continues its efforts to automate. While we applaud the move to automate and modernize entry procedures and processing, programs and specific legislative proposals must be implemented in such a way as to ensure that the substantial rights of the trade community are not impaired.

The foregoing observations are illustrative only; our silence on most of the Customs proposals should not be construed as either approval or disapproval of those proposals on which no comment is made. In the absence of specific legislative proposals and further study, we believe our comment would be premature.

CONCLUSION

CITBA very much appreciates the opportunity afforded by the Subcommittee on Trade to present our views and to have them considered in connection with these hearings. We stand ready to assist your committee in any way that we can and hope that there will be extensive further study of all of these proposals which ultimately will lead to substantial improvements in the overall operations of the Customs Service.

STATEMENT OF INTERCARGO CORPORATION
PREPARED BY WAYNE JARVIS, ATTORNEY

I. INTRODUCTION

Intercargo Corporation is a publicly traded company, headquartered in Schaumburg, Illinois. Intercargo through the nationwide offices of its managing agent, Trade Insurance Services, Inc., is a major provider of customs bonds throughout the entire Customs territory of the United States. Accordingly, Intercargo will have a direct and demonstrable interest in any legislation evolving from the findings and recommendations of the Trade and Oversight Subcommittee.

Recommendation II of Finding Number 15 of the Oversight Subcommittee Report stated:

"II. The U.S. Customs Service should -

A. Study and determine why it is unable to routinely issue timely and adequate notices to sureties under customs bonds. This study should include a compilation of data on the number of claims arising under customs bonds, the amounts of those claims, the length of time it takes to notify parties of the claims, the length of time for collection on those claims, the amounts collected, and the amount of staff time devoted to those collection activities. Customs should also identify any legal or practical impediments (internal and external) to collecting claims under customs bonds." (Report pp. 53-54)

From Intercargo's perspective, there are three principal reasons why customs bond payments become delayed: 1) documentation problems -- including lack of documentation, inaccurate documentation and the untimely production of documentation and assertion of demands; 2) delays by Customs in processing administrative protests; and 3) unnecessary legal disputes involving situations where a) Customs' failure to follow its own laws or regulations impairs the surety's subrogation rights and/or gives rise to a legal defense, or b) Customs' aberrant or overzealous interpretation of laws and regulations, invites time consuming legal challenges.

II. DOCUMENTATION PROBLEMS

A. Lack of Documentation and Inaccurate Documentation

In discussing the problem of documenting customs bond claims, the Pickle Report stated: "Customs rarely issues notices in a timely manner to the surety of claims under the bonds, and when notices are issued, they are often inadequate or inaccurate... [M]any of those claims dated back for years. In some cases, Customs did not have the documentation required to pursue the claim in court. In other cases, they had the documentation, but it was scattered or unavailable because it had been sent to records storage warehouses." Report, pp. 52-53.

In an attempt to revamp its paper dependent environment, Customs has been developing the Automated Commercial System (ACS), the goal of which is to automate all phases of the commercial processing of imported merchandise by creating a single system based upon a series of "modules." For example, Customs has developed, as an integral module of the ACS, an Automated Broker Interface (ABI), which allows the electronic interchange of import data between Customs and the trade community. On January 25, 1990, Customs published proposed regulations in the Federal Register regarding electronic entry filing, noting: "Since ABI transmissions currently account for over 70% of all entry summary

transactions, it is for the mutual benefit of both Customs and the trade community to be able to begin to rely totally on electronic transmission and abandon the dependency on paper thereby resulting, as indicated, in reduced costs, increased efficiency, and the expedient release of cargo." (emphasis added) 55 FR, No. 17, p. 2528, et seq.

On August 17, 1987, Customs published a public notice in the Federal Register introducing another ACS module, the Automated Surety Interface (ASI). ASI would facilitate the electronic filing of single transaction bonds and continuous bonds, and the ASI is intended to expedite cargo clearance, verify bonds at the point of cargo release, eliminate a substantial number of documents, speed the collection of duties, and implement a more systemic control of defaulting parties. As a prelude to ASI, Customs is presently providing weekly data tapes to sureties on a subscription basis. These tapes are intended to contain current data records of open entries, liquidations, liquidated damage cases and supplemental duty bills.

Unfortunately, Intercargo has observed several serious problems with ASI:[1]

1. Customs has occasionally changed tape formats without advance notice. Consequently, the data received is inserted into incorrect fields and Intercargo's data files become unreliable.

2. Although Customs recalculates interest on additional duty bills every 30 days, it does not provide updated interest information when its system calculates a rate change. This introduces enormous confusion and contention in the claims handling process because the amounts Customs reflects in its system vary from the amounts provided to Intercargo via ASI.

3. Perhaps the most serious problem is that there are currently no safeguards in ASI to ensure that basic information which is introduced into Customs' system is accurate. For example, Intercargo recently received a liquidated damage demand from Customs alleging that a non-conforming vehicle had not been redelivered or brought into compliance with the EPA and DOT standards. The Customs system indicated Intercargo's surety identification code and Customs issued a demand for payment to Intercargo. In 1986, Intercargo established a policy forbidding the execution of such bonds without collateral; it confirmed that it was not holding collateral on the transaction. When Intercargo finally obtained the documents, they revealed that Gramercy Insurance Company was the surety on the transaction.

Customs has absolutely no safeguards in its data entry process to prevent such errors. Thus, something as basic as the identification of the surety on a transaction cannot be relied upon

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[1] Apparently, Customs' computer problems are not limited to its commercial activities. In a Report presented to the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, entitled "Customs Automation: Automated Border Interdiction System Flawed By Faulty Data" (March, 1990) the General Accounting Office found: "Because of systemic deficiencies in the creation of the computer records, there is an increased risk that known or suspected law violators may enter the United States undetected and that innocent persons may be stopped and intensively inspected at the borders for offenses they did not commit." A draft version of the GAO Report was provided to the Trade Subcommittee by Chairman Don Edwards (D.Cal.), Subcommittee on Civil and Constitutional Rights, on February 21, 1990.

as accurate.[2/] The Surety Association of America has for many years urged Customs to record surety assigned bond numbers in ACS. It has also suggested that a system of unique formats and/or check digits could eliminate many of the surety identification errors which presently exist within the system. Unfortunately, Customs has steadfastly refused to utilize such information.

Interestingly, Customs apparently intends to continue to require documentation on all "high risk" transactions. For example, in the proposed regulations regarding electronic entry filing, published in the Federal Register on January 25, 1990, Customs stated: "Customs would determine whether the transmitted data complies with its cargo and entry summary selectivity criteria. These criteria refer to catagories of information which Customs uses to evaluate and assess the nature of a shipment as routine or high risk and thus whether the shipment merits general examination with document review or intensive examination and the entry summary merits summary document review in addition to electronic processing. If Customs determines that the data submitted for a transaction is error-free and passes the selectivity criteria (warning-free), paper documentation would not be required and the filer would be notified of the electronic "paperless" status of the transaction." Vol. 55 FR No. 17, p. 2528. Since the majority of the bond claims involve "high risk" transactions, it appears that Customs will still be requiring documents on most transactions involving bond claims.

Since its inception, Intercargo has attempted to use data processing resources to the greatest extent possible in conducting its business operations. Accordingly, it supports Customs' efforts to automate under ACS, particuarly the ASI module. However, the Congress should not be swayed by the notion that automation is a panacea, particularly on a short-term basis, for the budgetary and manpower problems which have given rise to the "neglect" cited in Finding Number 15 of the Pickle Report. Intercargo views the ACS as a valuable informational tool. However, as long as documents are the final arbiter of liability under a bond, Customs must still produce such documents to substantiate proof of loss and receive payment from sureties.

B. Untimely Production of Documents and Assertion of Demands

Even if Customs has maintained accurate records, and is able to locate them when requested, the untimely production of such documents and the assertion of demands predicated thereon, is a major source of contention between Customs and sureties. For example, §142.15 of the Customs Regulations requires that an "immediate" demand for liquidated damages be made against a principal and surety in the event an entry summary is not timely filed or estimated duties not timely paid. Nevertheless, as the Subcommittees previously learned, Customs has frequently failed to issue such demands until many months after the violation occurred. Such delays in receiving information exacerbate the surety's risk exposure by precluding it from taking prompt action to compel the importer to pay estimated duties. This is the single greatest reason sureties sustain losses on customs bonds. The ACS currently produces reports for internal use by Customs which identify entries for which entry summaries have not been filed or on which

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2/ Customs has proposed an actual "live" surety interface featuring a "paperless" bond. The process would feature transmission of bond information to Customs by the customs broker under ABI. Customs would then transmit entry information to the surety identified in the ABI transmission and that surety would then respond by accepting or rejecting liability and authenticating its action by means of codes. Instituting this program could eliminate many of the problems of surety identification and liability acknowledgement.

estimated duties have not been paid. However, demands against sureties are frequently issued long after the transaction appears on these internal reports. Instituting an "early warning system" utilizing the internal ACS data would obviously enable sureties to take prompt action to reduce or limit claims. A more meaningful solution, however, would be to codify the limitation period in §142.15 of the Regulations into the law to ensure that it will be enforced.

An even more compelling example is the notices Customs recently sent to various sureties represented by Trade Insurance Services, Inc. relating to certain additional duty bills issued during 1984 and 1985. The notices stated that the Commissioner of Customs would order all Regions and Districts to refuse to accept the sureties' bonds if the bills were not paid within 30 days. However, the vast majority of these demands were not documented. Although the sureties asked to review and copy documents at various district offices and also made document requests under the Freedom of Information Act, virtually none of the documents requested have been produced.

Customs' ongoing nationwide liability to substantiate bond claims indicates an obvious lack of resources. Intercargo has proposed at least two non-exclusive solutions to remedy the problem. The first would be to employ independent contractors to locate, copy and mail documents to sureties after a demand for payment is issued. The sureties would either enter into an agreement with Customs to absorb the expense, or a fee schedule regarding such services could be added to the Customs Regulations. The second solution involves transferring files to centralized locations for review. The Customs territory of the United States is presently divided into 44 Districts; these offices are divided between 7 geographic Regions with regional headquarters located in major cities. Repeated inspections at each district office would be prohibitively expensive. Intercargo has proposed that after a demand for payment is issued, the district office transfer the file to its regional headquarters to facilitate inspection and copying by the surety. There is precedent for such a transfer in practice before the United States Court of International Trade. USCIT Rule 80(a). Unfortunately, Customs has failed to adopt either of Intercargo's suggestions.

C. Recommendations

1) Require Customs to continue developing and refining the ACS modules as informational tools to be utilized both by Customs and the international trade community. Continue to require the preparation, filing, maintenance, and production of documents until ACS is verifiably fail-safe.

2) Require Customs to provide sureties with internal ACS data regarding entry summary/estimated duty discrepancies and other information to identify potential bond claims at the earliest practicable date.

3) Amend 19 USC §1505(a) to read: "Unless merchandise is entered for warehouse or transportation, or under bond, the importer of records shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon. Any demand against a surety to pay estimated duties upon the default of the importer of record shall be made not later than thirty days after the date such deposit was originally due."

4) Require Customs to investigate and report to the Congress upon the feasibility of employing independent contractors to locate, copy and mail documents to sureties on a fee basis.

5) Require Customs to implement a procedure under which files involved in bond claims could be transferred from the districts to the regional offices to facilitate inspection and copying by sureties.

III. DELAYS IN PROCESSING PROTESTS

Sureties are entitled to file administrative protests contesting duty assessments and other "decisions of the appropriate customs officer." 19 USC §1514(a). A surety's protest must presently be filed within 90 days from the date of mailing of notice of demand for payment against its bond. 19 USC §1514(c)

When Customs is unable to adequately or timely document bond claims, the surety cannot determine whether it should file a protest before the applicable limitations period expires; and if a decision is made to file, the surety's ability to frame a meaningful submission is questionable. If the surety fails to file a timely protest, the assessment will become "final and conclusive" upon all parties. 19 USC §1514(a). Thus, the surety is frequently forced to file "protective" protests to preserve its rights, pending receipt of documents. Once the documents are received, the protests are then amended as required. If Customs was able to adequately and timely produce substantiating documentation, the foregoing procedure would obviously be unnecessary. The filing of "protective" protests places an additional burden on Customs offices and becomes yet another obstacle to the receipt of payment. For example, if Customs timely produced documentation conclusively established the surety's liability, payment would be tendered and an administrative submission would not have to be reviewed.

Once protests are filed to contest an assessment there is no limitation imposed upon Customs to process such submissions. 19 USC §1515(c) does require the appropriate Customs officer to review and allow or deny the protest in whole or in part within two years from the date it was filed. However, the statute does not provide any negative consequences if Customs fails to act within the time prescribed.

Recommendations:

1. Amend 19 USC §1514(c) to provide that "a protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of proof of loss or breach of the bond."

2. 19 USC §1515 should be amended to provide that a protest shall be considered to be "deemed allowed" if it is not decided within two years from the date it is filed.

IV. UNNECESSARY LEGAL DISPUTES

Intercargo has observed several recurring legal disputes which regularly delay the collection of bond claims. The first, Customs' repeated failure to comply with the "immediate demand" requirement of §142.15 of the Customs Regulations, was discussed in Section II, supra.

The second involves Customs' failure to provide sureties with proper notice when the liquidation of an entry is extended. Prior to the Customs Procedural Reform and Simplification Act of 1978

(P.L. 95-410), there was no time limit for liquidation to be accomplished. P.L. 95-410 amended the Tariff Act of 1930 by adding a new provision, 19 USC §1504, providing that an entry not liquidated within one year from either: 1) the date of entry; 2) the date of the final withdrawal of merchandise covered by a warehouse entry; or, 3) the date of withdrawal from warehouse for consumption, where duties may be deposited after the filing of an entry or withdrawal from warehouse; shall be "deemed liquidated" at the rate of duty, value, quantity, and amount of duties asserted at the time of entry. 19 USC §1504(a). Section 1504(b) authorizes the Secretary to extend the liquidation period if: 1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate Customs officer; 2) liquidation is suspended as required by statute or court order; or, 3) the importer, consignee, or his agent requests such extension and shows good cause therefor. Section 1504(b) also requires the Secretary to give notice of such extension to the "importer, his consignee, or agent in the form and manner as the Secretary shall prescribe in regulations. Section 1504(c) provides that "[I]f the liquidation of an entry is suspended, the Secretary shall, by regulation, require that notice of such suspension be provided to the importer, or consignee, and to any authorized agent and surety of said importer or consignee." Thus, because suspension is one of the three grounds upon which liquidation can be extended, sureties must receive notice of extension arising under §1504(b)(2) (i.e., suspensions), but not those arising under §§1504(b)(1) and (3).

The legislative history of §1504 explicitly stated that: "The provisions adopted by the committee would increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction. Under the present law, an importer may learn years after goods have been imported and sold that additional duties are due, or may have deposited more money for estimated duties than are actually due but be unable to recover the excess for years as he awaits liquidation. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries." (emphasis added) Sen.Rep.No. 95-778, 95th Cong., 2d Sess., 32 (1978).

On August 9, 1979, Customs promulgated regulations providing sureties with equal notice of all extensions. Predicated upon these regulations, Customs maintains that it has provided sureties with extension/suspension notices since at least June, 1981. Thus, codification of these regulations would not require Customs to incur any additional expense or implement new procedures.

In reality, sureties frequently fail to receive extension notices, thus increasing their risk of loss. In litigation involving §1504, Customs has revealed that although the Regulations provide for up to three, one year extensions of liquidation, Customs computers do not record the dates of the first and second extensions. Customs has also revealed that it does not retain hard copies of the extension notices which it purportedly issues. Finally, because of its inability to process entries in a timely fashion, Customs frequently extends the liquidations under the guise that information needed for a proper appraisement or classification is unavailable.

Customs' administration of the extension procedure has effectively eviscerated §1505 and thwarted the intent of Congress. To further complicate matters, the Court of International Trade has held that Congress did not inadvertently omit sureties from §1504(b); thus, unless a surety can demonstrate that its failure to receive an extension notice resulted in a material increase in its risk, it cannot be discharged from liability. Old Republic Insurance Company v. United States, 10 CIT 589, 600-602 (1986). Twelve years after Congress acted to protect sureties by limiting their liability in situations involving undue administrative delay, sureties still do not receive equal notice of extension of liquidation. While importers are statutorily entitled to receive notice of all extensions, sureties are only entitled to receive notice of extensions arising under §1504(b)(2), (i.e., suspensions). Thus, while an importer who fails to receive notice of an extension occurring under §1504(b)(1) and (3) is relieved of all liability for additional duties, sureties who fail to receive such notices aren't. Because a customs bonds makes a surety jointly and severally (and not secondarily) liable for all such increased or additional duties, there is no rational reason why a surety should be arbitrarily excluded from a class of equals and required to pay certain assessments that an importer would not. Accordingly, Intercargo believes that §1504(b) violates Equal Protection under the Fifth Amendment to the United States Constitution. The simple solution is to amend §1504(b)(1) and (3) by codifying the notice requirement contained in §159.12 of the Regulations into the statute.

The third area of dispute involves Customs' practice of collecting interest at the rate of 36.5% per annum on undeposited estimated duties. Currently, a deposit of the estimated duties owed by the importer of record must be made at the time of entry of merchandise, other than entry into warehouse, for transportation, or under bond. If it is determined upon liquidation or reliquidation that additional or increased duties are due, the appropriate Customs officer must collect them. Section 203 of the Trade and Tariff Act of 1984 (P.L. 98-573) amended §§505 and 520 of the Tariff Act of 1930, as amended (19 U.S.C. §1505 and §1520), to provide for the payment of interest on applicable overpayments or underpayments of increased or additional duties in accordance with the Internal Revenue Code rate established in 26 U.S.C. §6621 and §6622. These amendments did not affect underpayments or overpayments of estimated duties assessed under 19 U.S.C. §1505(a). Customs presently lacks statutory authority to collect interest assessed upon undeposited estimated duties from either importers or their sureties. 19 U.S.C. §1505 and §1623.

Ignoring this absence of statutory authority, Customs has wrongfully attempted to administratively vest itself with such authority. On May 12, 1983, Customs issued Treasury Decision 83-117 entitled: Guidelines For Disposition of Violations of the Timely Entry Summary Filing Requirements - 1983 Revision. Effective May 1, 1983, Customs began assessing an administrative fee of $50.00, plus interest on undeposited estimated duties at the annual rate of 36.5%.

Most recently, on April 21, 1989, Customs published in the Federal Register, Treasury Decision 89-48, a General Notice entitled: Customs Bond Cancellation Standards. The Notice followed the amendment of 19 U.S.C. §1623 contained in §1904 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418) which required: "In order to assure uniform, reasonable, and equitable decisions, the Secretary of the Treasury shall publish guidelines establishing standards for setting the terms and conditions for cancellation of bonds or changes thereunder." (emphasis added) Treasury Decision 89-48 affirmed Customs' earlier attempt to justify the assessment of interest on undeposited estimated duties at the annual rate of 36.5 percent. To

date, Customs has wrongfully collected vast sums of money from both importers and sureties under the purported authority of these Treasury Decisions.

The usurious interest rate Customs has and intends to continue to assess without statutory authority is unprecedented in the Federal revenue collection scheme. Moreover, unlike its practices regarding the assessment and refund of interest on additional duties, Customs does not refund any interest on excessive deposits of estimated duties. Intercargo is not unmindful of the ongoing budgetary constraints under which Customs operates and recognizes that it would be equitable for Customs to collect reasonable interest on undeposited estimated duties. Concomitantly, Intercargo believes it would be equitable for Customs to be required to refund interest at an identical rate on excessive deposits of estimated duties.

Recommendations:

1. Amend 19 U.S.C. §1504(b) to read: "The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer and his surety in such form and manner as the Secretary shall prescribe in regulations, if -."

2. Amend 19 U.S.C. §1505(a) to add the following language at the end thereof: "Estimated duties that are not timely deposited shall be considered delinquent and bear interest at the Internal Revenue Code rate established by 26 U.S.C. §6621 and §6622."

3. Amend 19 U.S.C. §1520(d) to read as follows: "If a determination is made to reliquidate an entry as a result of a protest filed under §1514 of this title, or an application for relief made under subsection (c)(1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as either estimated duties pursuant to §1505(a) of this title, or increased or additional duties under §1505(c) of this title, at an annual rate established pursuant to those sections and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under §2632 of Title 28, whichever occurs first."

4. Delete 19 U.S.C. §580, an interest statute originally promulgated in 1799, as superfluous.

V. CONCLUSION

Finding Number 15 of the Pickle Report found that: "[A]pparently, Customs officials believe that sureties should pay any and all claims made of them by Customs without question. Customs officials expressed great frustration with sureties who would not just pay without asking questions." Report, p. 53.

It is Intercargo's policy to tender payment when its obligation under a bond is unquestionable, or there is a strong likelihood of salvage from the bond principal. Although Intercargo has an obligation to the government under its bonds, as a publicly traded corporation, it likewise has an obligation to its shareholders not to deplete corporate assets by paying questionable claims.

Intercargo respectfully submits that the adoption of the recommendations contained in this Statement will contribute significantly to reversing Customs' policy of "neglect" cited in Finding Number 15.

Respectfully submitted,

INTERCARGO CORPORATION

By: _____
Wayne Darvis, its attorney

May 3, 1990

STATEMENT OF THE
INTERNATIONAL MASS RETAIL ASSOCIATION
SUBMITTED TO THE
SUBCOMMITTEE ON TRADE
OF THE
WAYS AND MEANS COMMITTEE
U.S. HOUSE OF REPRESENTATIVES
ON
THE COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE
MAY 4, 1990

The International Mass Retail Association (IMRA) is a trade association representing 140 major discount retail chains operating over 25,000 stores in all 50 states. Our members collectively employ hundreds of thousands of Americans, and their sales represent an overwhelming majority of the $130 billion discount retail industry.

IMRA's members sell a wide variety of imported merchandise. When combined with U.S. products, imports allow discounters to offer consumers a wide variety of choice and value. The strength of our companies depend on the strength and depth of our merchandise assortments and the timeliness with which we get merchandise to market. For this reason, our interest in the efficiency of Customs commercial operations is a strong and direct one..

We want to thank the Ways and Means Committee Oversight Subcommittee for recognizing these commercial realities, and for identifying areas within Customs commercial operations that need improvement. It is gratifying to know that members of the Ways and Means Committee have been listening to the often expressed concerns of the business community about entry delays and lack of compliance information.

We also want to thank the new Commissioner of Customs for her willingness over the past few months to discuss these issues in a new, less adversarial atmosphere. We strongly believe that Congress, the business community and the Customs Service can work together to create an environment where commerce can be moved efficiently and where responsible businesses can and will comply with the nation's importing regulations and laws.

Creating an Environment of Informed Compliance

The first step in creating such an environment is making a commitment to programs that will help importers fully comply with the importing laws of this country. This concept of "informed compliance" must have three elements:

First, importers need to know and be able to find out what the laws are, and if necessary to obtain advice when there are questions about the treatment of new articles of commerce.

Second, importers need some measure of certainty that the law and the interpretations of it will not change suddenly, without notice and an opportunity for comment.

Third, importers expect the Customs Service to enforce the laws in a reasonable and fair manner.

To this end, IMRA strongly supports the recommendations contained in the Oversight Subcommittee Report designed to improve the flow of information between the business community and the Customs Service. We believe these suggestions for creating an ombudsman's office, requiring reasonable time periods for phase in of new regulations and regularized communications between Customs and the business community will go a long way toward improving the climate for informed compliance.

IMRA Supports HR 4689

In our view, however, additional legislation is also needed to support informed compliance programs in several important areas. For this reason IMRA endorses HR 4689, introduced on May 1st by Congressmen Pease and Frenzel. In our view, this bill combined with continuing Congressional oversight will bring the Customs Service into the 21st Century and create an environment where international businesses can move commerce quickly, fairly and efficiently.

There are several specific provisions of the Pease-Frenzel bill that warrant support of this subcommittee.

Public Notice and Comment

Section 101 of HR 4689 would require the Customs Service to give public notice of and an opportunity to comment on any limitation of the application of court rulings, or other changes in administrative practice. This change is sorely needed to improve the cooperation of the business community and the Customs Service.

As the Oversight Subcommittee Report accurately notes, Customs has not done a good job of notifying the business community of changes of practice or providing commercially realistic time frames for these changes. No importer wants to discover at the point of entry -- when time is of the utmost concern -- that Customs has changed the rule a week before without publishing them. It would be far better to advise the importing community of changes well in advance of their enforcement so that responsible businesses can fully comply with Customs' wishes -- before merchandise arrives at the port. For this reason, subjecting changes of practice to the usual requirements of the Administrative Procedures Act, as the Pease-Frenzel bill would, is strongly supported by IMRA's membership.

In addition, The Court of International Trade frequently issues rulings on classification issues that importers use to determine the proper tariff or quota classification for merchandise entries. If Customs intends to limit the application of such rulings, it would be equally helpful for Customs to publish its intention to do so. Once again, Section 101 of HR 4689 would remedy this situation.

Enforcement Clarifications

Sections 102 and 103 of HR 4689 deal with enforcement issues which have already come before this subcommittee on several occasions and which remain confusing to the importing public.

Section 102 is designed to clarify, once and for all, the circumstances under which merchandise can be seized under Section 596(c) of the Tariff Act. This seizure authority was provided by Congress in 1986 as part of the Comprehensive Anti-Drug Enforcement Act and was designed to apply to contraband and other prohibited merchandise. As the Oversight Subcommittee Report has documented, Customs has abused this authority -- using it to seize commercial merchandise where Section 592 penalties would work just as well.

While IMRA recognizes and even applauds Customs' admission that it overused and abused this authority, we strongly believe Congress must act legislatively to clarify the situations where Customs may use this authority. We believe HR 4689 accomplishes this end by allowing Section 596 seizures only in cases where merchandise cannot be seized under Section 592.

Section 103 of HR 4689 creates a statutory definition of the terms "fraud," "gross negligence" and "negligence," based on the

definitions that were formerly contained in appendix B to Part 171 of the Customs Service's Regulations. These longstanding definitions were commonly in use in 1978 when Congress created the three levels of culpability under Section 592 of the Tariff Act. In particular, the previous regulations required that "fraud" be an act "of commission or omission deliberately done with intent to . . .violate the laws of the United States."

In September 1989, Customs administratively adopted a new definition of fraud which removes the requirement that fraudulent violations be deliberately done with intent. Under this new guideline a violation is determined to be fraudulent "if the material false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally."

In our view, this new definition blurs the line between fraud (which should require clear intent) and gross negligence (which is an act done with actual knowledge of, or wanton disregard for the law) HR 4689 corrects this and will preserve the three levels of culpability contained in Section 592 by returning to the pre-1989 definition of the term fraud and including a requirement for intent.

Trade Operations

Section 106 of HR 4689 would establish a program for certifying private testing laboratories that is strongly supported by IMRA's membership. This provision would allow the Customs Service to certify private labs, and allow importers to submit product tests from these labs in lieu of Customs laboratory testing. It would not weaken Customs' ability to challenge test results or to make independent examination of testing labs, it is intended to allow commercial laboratory testing to facilitate the quick release of merchandise requiring tests.

IMRA would like to point out that Customs has some authority in this area under existing law, but has been slow to use it. In fact, several IMRA members have had situations where the Customs Service has refused to acknowledge the results of certified labs, and has refused to release information about its testing protocols. The Oversight Subcommittee Report has identified this as a problem area, and we believe HR 4689 will correct this deficiency.

Commercial Automation

Finally, IMRA urges the Trade Subcommittee to make changes in the existing body of Customs law necessary to allow electronic processing of entries. At the same time, we agree with many of the findings of the Oversight Subcommittee on the issue of automated services and urge Congress to continue its oversight in this area. In particular, we believe Congress must ensure that Customs develops a strategic plan for commercial automation systems and sticks with it.

At the same time, we believe Congress should provide Customs with the statutory basis for moving ahead on paperless entry, and we believe HR 4689 will provide that basis.

In addition, our members strongly support the concept of National Entry Processing which would allow electronic filing of entries at sites remote from the port of entry. The Pease-Frenzel bill calls for a test of this program, which we surely support. However, we hope that testing will not become an excuse for delaying remote filing of entries. In our view, once electronic filing of entries is a reality, it makes no practical sense to require that entries be filed at the port of entry. The information contained in electronic entries will be available at any port, regardless of the location in which they were entered into the system.

Finally, we hope Customs understands that remote filing of entries should not mean a reduction in the number of inspectors or import specialists at specific ports. In our view such on-site staff reductions would be counter to the kind of informed compliance approach Customs needs to take in the future. Inspectors and import specialists will continue to play an important role, whether entries are filed on paper or by computer.

Conclusion

Once again, IMRA wants to thank the Oversight Subcommittee for identifying the issues and steps that need to be taken to improve the climate for international businesses and commerce. We look forward to working with the members of the Trade Subcommittee on legislation that will ensure that Customs moves into the 21st Century.

STATEMENT OF THE NATIONAL APPAREL & TEXTILE ASSOCIATION

The National Apparel and Textile Association (NATA) is a non-profit trade association comprised of over 60 companies with interests in textile and apparel trade. The majority of our members are direct importers, but the association includes retailers, port authorities, transportation companies, customs brokers, banks, and other related businesses.

In June of 1988, our members were sufficiently concerned with the delays and additional expenses caused by U.S. Customs Service operations to testify at the hearings conducted by the Subcommittee on Oversight. As a direct result of the involvement of the Congress, we have seen real progress, both in the attention given by Customs to commercial operations and in administrative solutions to some of the specific problems we raised.

Commissioner of Customs Carol Hallett and the Commercial Operations staff have expressed their commitment to improving the working relationship between the Customs Service and the business community. This commitment has manifested itself in a number of programs, including outreach efforts that have been of great benefit to NATA members. Our members have formed task forces that meet regularly with Customs District officers in Seattle and Los Angeles to discuss operations problems. Not only have a number of issues been resolved, but the District officers have made it clear to us that they recognize that the discussion serves both parties.

We want to express our thanks to Mr. Pickle and the Subcommittee for their efforts; we also urge the Congress to go forward and complete the work that was begun by adopting legislation that will prevent a recurrence of abuses by the Customs Service, and will encourage the reasonable enforcement of the statutes and regulations that control trade.

Response to Oversight Subcommittee Report

NATA supports the findings of the Subcommittee on Oversight, and the recommendations for correcting the problems discovered during the Oversight investigation. We are especially pleased with the recommendations regarding communications with the trade community: the creation of an Ombudsman, the recommendations for public meetings and gradual implementation of policy and procedural changes, all speak directly to our testimony in 1988.

We agree that it is reasonable to provide a funding floor for commercial operations, to ensure that there are always Customs officers available to handle the business of trade, whatever other demands may be put on the organization.

Support for Legislation

NATA members are seeking a predictable business environment. If a member knows the requirements of the statutes and regulations enforced by U.S. Customs and takes reasonable steps to ensure compliance, he (or she) should be able to proceed with reasonable confidence that products will be delivered as planned. Therefore, NATA encourages the Congress to look beyond the Oversight recommendations, and to adopt legislation addressing issues for which the Oversight Report proposes only regulatory or administrative solutions. HR 4689, introduced by Congressmen Pease and Frenzel, covers the issues of concern to our members.

We would like to draw your attention to some of the key provisions of the Pease-Frenzel bill.

1. Seizure authority

   The Oversight Investigation found that U.S. Customs had abused the seizure authority granted it by Congress in 19 USC 1595a(c), seizing imported merchandise inappropriately. U.S. Customs has agreed

with this finding, and has changed its practice, but this change may be subject to a reversal of policy.

Encouraging the Customs Service to make more judicious use of seizure authority is a positive step, but less effective than revoking their authority to seize commercial cargo (which is covered by broad sanctions under other provisions). Without legislation, the atmosphere of certainty that fosters business growth cannot be assured.

The Pease-Frenzel bill would amend the current seizure authority to require that the Customs Service use the civil penalties (amounting to forfeiture value), and seizure authority, under 19 USC 1592 for civil violations, resorting to seizure under 19 USC 1596 only when that remedy is not available. Section 592 penalties are a significant deterrent to violations without the additional jeopardy, for the business community, of lost deliveries.

2. Testing and Detention

One of the issues raised in our testimony was the lengthy delays experienced waiting for test results from the Customs Service's laboratories. Two provisions of the Pease-Frenzel bill would address this problem directly. The first establishes certified laboratories able to test merchandise to verify its conformity to description, and the second addresses the Customs Service practice of holding merchandise in the limbo called "detention," without allowing the importer access to due process.

For NATA members, as for many importers, timely delivery of imported merchandise is critical. Whether the reason is meeting rigid seasonal delivery dates or keeping production lines running, the ability to predict when goods will be available is an essential part of planning. The bill does not seek

to direct U.S. Customs in how to perform its mission, or restrict its authority to test or examine imported merchandise. It simply offers the importer options in ensuring the availability of goods. If the shipment is "detained" because of missing information, it ensures that the importer will know the reason, and be given the opportunity to take corrective action.

3. Regulatory Audit

This is an area that was not addressed in Oversight report, but is an important element in achieving the predictability and communication our members seek. U.S. Customs uses the audit function as a means of verifying and assessing an importer's compliance. To ensure that such audits provide maximum benefit to the Customs Service without disrupting the operations of the audited business, the bill requires that U.S. Customs conduct an audit according to reasonable principles. These principles include notifying the audited company of timing, and providing results so that the appropriate changes in operations can be incorporated into a customs compliance program.

The Pease-Frenzel bill will not restrict U.S. Customs's authority to use its Regulatory Audit division to support investigations. It simply makes the distinction between an investigation, where wrong-doing is suspected, and a routine compliance audit.

4. Automation

The Oversight Report recommends changes to the growth of the Automated Commercial System (ACS). NATA endorses the findings, and the recommendation for a strategic plan to direct further automation. However, it is our belief that the Customs Service will have to rely increasingly heavily on ACS in the

future if it is to be effective in fulfilling its mission. To that end, we support legislation that will allow automation to go forward, with the understanding that it will be necessary to correct flaws in the system, and to proceed according to a strategic plan. The Pease-Frenzel bill contains the necessary authority to allow U.S. Customs to expand automated activities.

In conclusion, we would like to thank the Subcommittee for giving us this opportunity to comment on the legislative and administrative recommendations of the Subcommittee on Oversight. Your continued commitment to the vital question of the operations of the U.S. Customs Service is the surest way of achieving the modern, efficient Service that can best serve the interests of the country.